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A MODEL FOR WORLD COURT ORGANIZATION
THE FEDERAL JUDICIARY

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LEONARD S. SAXE

AMERICAN JUDICATURE SOCIETY
Ann Arbor, Michigan

THE AMERICAN JUDICATURE SOCIETY

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JOURNAL OF THE AMERICAN JUDICATURE SOCIETY

Vol. 28, No. 3 GLENN R. WINTERS, Editor October, 1944

The Federal Judiciary—A Model for World Court Organization

THE PROBLEMS INVOLVED in establishing permanent peace among the nations of the world bear a great resemblance to those encountered a century and a half ago in setting up the peaceful community of states that is our federal union. The methods successfully employed here deserve respectful consideration from those who plan the post-war world. The analogy runs true throughout the whole range of governmental activity, including the judiciary, which is our present concern. What are the conclusions with respect to an international judiciary that may reasonably be drawn from our experience with federal courts in this country?

First, national courts cannot be depended upon for the administration of international justice. Lack of a federal judiciary Alexander Hamilton declared to be the crowning weakness of the unsuccessful Articles of Confederation that preceded our constitution. An international supreme court could decide many of the disputes between governments which in the past have led to war, and if it were of lofty standards and world-wide prestige the nations would eventually be no more embarrassed to submit to its jurisdiction than the American states have been to accept the judgments of the United States Supreme Court. To have such prestige it would, of course, have to have more than consent jurisdiction.

An international supreme court, however, could no more handle all the international litigation of a busy peacetime world than the United States Supreme Court could handle all the cases that crowd the dockets of our federal district courts. Diversity of nationality should afford the same basis for international court jurisdiction that diversity of citizenship does in the federal courts, and for stronger reasons, since national courts would be more likely to discriminate against nationals of other countries than our present day state courts do against citizens of other states. The other bases of federal jurisdiction would also have their parallels. To meet these needs there should be a world-wide system of international courts.

There is at least one federal court in every American state, and regardless of docket conditions there should be at least one international court in every

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country, by its very presence to remind the people of the existence of law and order on a world-wide scale. In addition, there would doubtless be international courts in all of the leading commercial and industrial cities as traffic might require.

Judges of the federal courts are always chosen from the district in which they are to serve, but are appointed by the president of the United States. In like manner, judges of international courts should be selected from the nation in which they are to serve, but the appointment should be made from the outside by an international authority. This would promote the confidence of the people in the courts, but would keep the judges aloof from national politics and other corrupting local influences.

The federal courts for many years operated under procedure conforming to that of the state in which the trial was held, but they recently adopted uniform federal procedure. Uniform procedure in international courts might work out all right in the leading countries, but in view of the widely differing systems of law prevailing in some parts of the world, some concessions in the way of procedural conformity might have to be made. An office corresponding to the Administrative Office of the United States Courts would be an absolute necessity if any sort of unity were to be maintained in such a far-flung organization.

These suggestions—and others of like nature that will occur to the reader—are largely based on the assumption that some form of world government will be adopted. This too is justified by the American analogy, the League of Nations corresponding rather closely to the first weak organization of the colonies under the Articles of Confederation. If, however, no world government materializes, there will still have to be an international judicial system of some sort. The Permanent Court of International Justice has already been at work for more than a quarter of a century, and the work done by it and the international arbitration tribunals will have to be done by somebody. If the great powers are willing to cooperate at all they should be able to agree on some kind of improved international judicial system even if still limited to consent jurisdiction, and if that system were patterned as closely as possible along these lines it would do a great deal to encourage the reluctant nations to join with the rest of the world at last in a "more perfect"—and perpetual—"union."

OUR GOVERNMENTAL SYSTEM possesses the great advantage of permitting local experiment. We are clearly entering upon a period of readjustment through experiment. Nothing can stay this movement. What is most needed, then, is open-minded study of conditions and a chance for co-operation of both constructive and critical effort to the end that what is best shall survive and become a part of our institutions.

To say that the American Judicature Society is first of all and mainly an educational force is to express its catholicity of purpose and ideal of service. The Society invites the co-operation of all who are interested, but it offers no panacea. There is not now, and probably never will be, finality in respect to the proposals offered. Finality is less a present concern than service based upon the best experience obtainable. It is an evolutionary work which is undertaken.

The Society now invites the assistance and co-operation of all persons, lawyers or laymen, in furtherance of improvement in the administration of justice in order that we may have a social and political system no part of which is unworthy of our highest ideals.—*From the first issue of the* JOURNAL.

Judge Merrill E. Otis Elected President of Society

The Honorable Merrill E. Otis, United States District Judge, of Kansas City, Missouri, was elected president of the American Judicature Society at its annual meeting in the Drake Hotel, Chicago, September 13, 1944. He succeeds David A. Simmons, who had held the office since May, 1940.

The annual meeting was the largest in recent years, with seventy-three officers, directors, members and guests present. The feature of the program was the address "Immutable Principles" by Judge Otis, printed in this issue of the JOURNAL. The Honorable George Rossman, judge of the Supreme Court of Oregon, was elected vice-president to succeed Judge Otis. A few changes were made in the board of directors, as indicated in the list of names on the inside front cover.

Judge Otis becomes the sixth president of the American Judicature Society. His predecessors were: Charles Evans Hughes (1929-1930), Newton D. Baker (1930-1938), Frank E. Atwood (1938), Arthur T. Vanderbilt (1938-1940), and David A. Simmons (1940-1944). From 1913 to 1929 Harry Olson was the Society's only executive officer, with the title of chairman.

President Otis has been judge of the United States District Court for the Western District of Missouri since 1925. He has been vice-president of the American Judicature Society since 1940, and was chairman of the Section of Judicial Administration of the American Bar Association in 1941. He is a gifted orator, and a frequent contributor to legal periodicals, including this JOURNAL.

Mr. Simmons, the retiring president, took office the following day as president of the American Bar Association. The four years of his administration were the years of the American Judicature Society's greatest growth. During that time its membership increased from 2,000 to more than 6,000. Mr. Simmons will continue to serve the Society as director and as a member of its executive committee.

Immutable Principles

MERRILL E. OTIS

WHEN DAWN BRIGHTENS the sky the stars fade from our view; before the rising sun other celestial luminaries disappear. When wars, such as history has never seen, make every horizon lurid with their blazing fury and dominate every human sense, then we are not concerned greatly with lesser things.

I know the various sections of The American Bar Association this week are having their programs as in the past, each program filled with scholarly discussions, carefully prepared, of problems intrinsically significant, which once loomed large. But what problem, merely professional, seems large now, amidst the crash of worlds, when civilization, thrown to her knees but lately, in sweat and blood and tears has risen again to put forth her mightiest, her supremest efforts? It is difficult for lawyers to concentrate their thoughts on pre-trial procedure or on how the decisions of administrative agencies were best reviewed, when no man knows that the blue star in the service flag in the window of his home will not turn to gold before the sun goes down.

And so, when the distinguished president of our Society asked me to speak briefly at this annual luncheon, I could not immediately think of any theme that would not now seem insignificant. And then I conceived a theme which I thought I could state at least, not develop it, and, having stated it, sit down. I wrote the title and sent it to the assistant secretary—

Editor's Note: Address delivered at the annual meeting of the American Judicature Society, Chicago, September 13, 1944. Judge Otis is judge of the United States District Court, Kansas City, Mo., and is the newly-elected president of the American Judicature Society.

Immutable Principles. For there is a *corpus juris maximum* which is above, and beyond, and beneath, and around those lesser rules of law with which generally we are employed.*

The little lawyer (not the lawyer in the little town; he may be the profoundest lawyer), the little teacher (not the great teacher; the great teacher, like Pound, like Wigmore, ranks with the greatest expositors and interpreters of the law), the really little lawyer and little teacher will laugh at the concept of a corpus of immutable principles. The lovers of the Judicature Society will not laugh. If Herbert Harley were here today—that modest, self-effacing, far-seeing founder and presiding genius of this Society during many years—if he were here, he would not laugh. When that man of vision wrote the purpose of the Society he wrote—it appears in every number of the JOURNAL I have seen—"to promote the efficient administration"—not "of the law"—"the efficient administration of *Justice.*" I think he had in mind the immutable principles of justice. How ancient that concept is!

You remember, do you not, when, in your childhood, the gray-haired sire, in the family circle, read daily a chapter from the Holy Book? Fortunate you are if you had that experience. Robert Burns describes him:

"His bonnet reverently is laid aside,
His lyart haffets wearing thin an' bare:
Those strains that once did sweet in Zion glide,
He wales a portion with judicious care,
And 'Let us worship God!' he says with solemn air."

Out of that day and that book many a striking phrase and illuminating passage has come down and lingers in our memories. One phrase—not the most important—that abides with me is from that gripping book of Daniel: "according to the law of the Medes and Persians, which altereth not." Some day I shall have the opportunity, perhaps, and have the courage to ask a justice of the Supreme Court of the United States what is meant by "a law which altereth not." He will tell me—and I think he will be right—that our ancient kindred (for they were our kindred) meant only that the fundamentals of law and justice do not change as the swift seasons change. They believed, in that dim and distant past, and the judges of Israel believed, that the deep essentials of the law which governs man proceeded directly from the throne of God. Moses testified, did he not, that the divine hand chiseled the law on tablets of stone?

Was there ever such another land as Attica? In a single generation that little country produced the greatest sculptors, the greatest architects, the greatest dramatists, the greatest orators, the greatest poets, the greatest philosophers, the world has ever seen. Athens, as much almost as that other and older Holy Land, is our Alma Mater. When Hitler's legionnaires trampled it beneath their iron shod feet they walked on our hearts. The greatest lawyer of ancient Greece, Demosthenes, said: "Every law is a discovery, a gift of God." How often have you meditated on that declaration since, in college days, you read it first! "Every law is a discovery, a gift of God." A discovery! Then it was before it was discovered. When the adventurous Genoese caught his first glimpse of the New World from the deck of the slow-moving Santa Maria and so discovered it, the New World was there and had been there for ages. "Every law is a discovery."

Strangely enough, almost those very words were spoken twenty-three centuries after Demosthenes by a New England lawyer—he became president of the United States—who said: "Men do not make laws, they do but discover them." Francis Bacon, greatest jurist of the brave days of Queen Elizabeth, wrote: "The statute points to the law, as the needle points to the pole star; it does not create the law."

There was old Sophocles, greatest dramatist of the Periclean Age. What lawyer does not love the familiar story of the suit brought against him by his son, when Sophocles had passed eighty years, a suit to have him declared incompetent to manage his estate? The son desired to manage it. Sophocles, you remember, conducted his own defense. He read aloud to the court *Edipus at Colonus*, the greatest of all his dramas, which he had just completed.

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*In the preparation of this little address I have read much, but I wish to mention especially Honorable James M. Beck's "The Higher Law," delivered by him before the Section of Judicial Administration of the American Bar Association, August 28, 1918, and Professor Edward S. Corwin's paper on the same subject, 42 Harvard L. Rev. 149, 365.

Rightly he guessed that the court would say as it did say promptly, "One who can do that can also manage his estate." It was Sophocles who put into the mouth of Antigone, when the king demanded of her whether she had not transgressed the sovereign laws, these words: "I did not deem that they decree, mere mortal that thou art, could override those eternal and unfailing mandates which are not of today nor yesterday, but ever live and no man knows their birthtide."

The greatest system of law history has seen was that of Rome. For a thousand years it grew and spread. From its beginning that law incorporated *Jus Naturalis*. Marcus Tullius Cicero put the central concept in immortal words:

"True law is right reason, harmonious with nature, diffused among all, constant, eternal; a law which calls to duty by its commands and restrains from evil by its prohibitions. It is a sacred obligation not to attempt to legislate in contradiction to this law; nor may it be derogated from nor abrogated. Indeed, by neither the senate nor the people can we be released from this law. Nor is it one law at Rome and another at Athens; one now and another at a later time; but one eternal and unchangeable law binding all nations through all time."

Sixteen centuries passed after the tongue of our brother Cicero—the last great champion of the Roman Republic and constitution—had been stilled by an assassin's hand before lawyers and jurists began to write again as he had written. You have heard of Bonham's Case, Dr. Bonham's Case. The look of instantaneous recollection which I see on the faces of all lawyers present assures me that you know all about it. Bonham's Case, decided in 1606, reported in 8 Coke. I borrowed 8 Coke from the library of the Bar Association of Kansas City. It is in very good condition. This volume was printed in 1777. It is recited on the title page that the first edition was published "in the sixth year of the most high and illustrious James, King of England, France, Ireland and Scotland, the Fountain of all Piety and Justice and the Life of the Law." I surmise that James was not the last chief of state who regarded himself as the fountain of all piety and justice and the life of the law.

Curious old volume! Half Latin, half English. Nowadays a lawyer scarcely dares use so well known a Latin phrase as *res ipsa loquitur* lest he be suspected of parading his erudition. The pages of the old book have been yellowed by the passage of an hundred and seventy years. Unseen on those yellowed pages are the finger prints of many lawyers who long since departed from this earthly scene forever to join the company of Sir Edward Coke. Bonham's case.

Bonham, you recall, had studied medicine in the University of Cambridge, but he had not been licensed to practice his profession by the College of Physicians. An Act of Parliament had given that London corporation the authority to license or not to license. It provided, moreover, that any who practiced without a license should be prosecuted by the College, with the College as the trial tribunal, and that the College should have half of any fine assessed. (Nothing like it occurred again until very recent times.)

Of course Bonham was convicted and a heavy fine assessed. He refused to pay the fine. He was imprisoned. He sued the College for false imprisonment. That was the case in which Lord Chief Justice Coke wrote the famous sentence—the shades of Cicero and Demosthenes and Hammurabi stood by him as he wrote—"The common law will control acts of parliament, and sometimes adjudge them to be utterly void. For when an act of Parliament is against common right and reason, the law will control it and adjudge such act to be void." What was that but to proclaim the governing power of a law which altereth not; to declare again, as Cicero had done, "the eternal and unchangeable law binding all nations through all time."

But, says one, the doctrine of Bonham's case long since was thrown into the discard. Perhaps it was, in a sense. This I know, the case was cited as authority by the Supreme Court in 1927, in an opinion written by Chief Justice Taft. And this I know. Let some trial judge contemplate the imposition in a criminal case of a sentence which he knows is against common right and reason. The chances are, his tongue will cleave to the roof of his mouth. Let some appellate judge prepare to write what he knows violates fundamental principles of justice. The chances are, the pen will fall from his hand. The theorist in his academic closet

may deny that Coke's common right and reason and Cicero's "eternal and unchangeable law" are law. Put on that theorist's shoulders the judicial robe; he may discover that it cannot be said of all controlling law, *"Ita scripta est."*

The "law which altereth not," the "eternal and unchangeable law!" Perhaps there is some more modern proclamation of it. There is indeed. You will find it again and again in the opinions of the Supreme Court. For example, in *Powell* v. *Alabama.* Powell was a black boy who, in a state court, was sentenced to be hanged for a violation of state law. In no true sense did he have counsel at his trial. But no written law, state or federal, said in so many words he was entitled to have counsel. The Supreme Court declared void his conviction. Why? "That is not due process of law which conflicts with those immutable principles of justice which inhere in the very idea of free government." There are a dozen Supreme Court opinions which recognize as governing law "the immutable principles of justice." I looked up the meaning of "immutable" in the dictionary, and I found it means "that which changeth not, which altereth not."

Common right and reason, founded on eternal principles, is governing law in every court worthy to be called a court, the humblest and the highest. In the Ozark region of Missouri there is a court house which is a cube of home-made brick. The floors are bare and worn. No Latin mottoes—*Fiat Justitia, Salus Populi Suprema Lex,* are graved in golden letters in the entabulature of stone. By a creaking stairway one ascends to the sanctum on the second floor. Unpainted chairs are held in rows by binding boards beneath. A kitchen table serves the shirt-sleeved, pipe-smoking presiding judge. Cuspidors, strewn about, are aimed at and sometimes hit. Through open windows one sees on the court house green below a substantial part of the county's population, men, women, children, dogs. In Fords of ancient vintage, in wagons with grease-hungry wheels, on mule-back, on horseback and on foot, they have come to court, for here is drama free for all. When some new case is called or another witness is required, the sheriff, bustling with importance, pistol protruding belligerent from dragging holster, strides to the open window and calls out: "John Doe, come into court; John Doe, come into court!" There are no books, or few. Perhaps torn volumes of the statutes, with many pages missing. No books, but governing law—common right and reason, principles of justice which do not change. When the books conflict with them the books must change. In the humblest court, also in the greatest court.

We are looking forward to a trial soon to be held in a tribunal such as we have not seen. Accounts of that trial will fill the pages of all the journals. The arch-criminal of human history will be arraigned. The indictment will be read:

"You have brought murder and rape to a peaceful world. Millions of graves your bloody hands have digged. Races and nations you have enslaved. Cathedrals and synagogues and churches you have bombed and burned. Libraries and culture and learning you have destroyed. The souls of young men and young women you have perverted and debased. You have throttled liberty, slaughtered democracy, crushed fredom. You have defied God."

There will be no books. The immutable principles of justice, which alter not, will be the governing law in that tribunal at that trial.

When the certain and solemn judgment of "guilty" has been pronounced, what will be the punishment? I do not know. I have in mind a precedent. The citation is Paradise Lost. Written by John Milton, the most eloquent champion of liberty the world has known. (Two years ago Hitler, with a bomb hurled from the sky, destroyed the statue of Milton standing in the London church yard where the poet's bones are buried.) Yes, I have in mind a precedent. There was another once who—

"—trusted to have equall'd the Most High
If he oppos'd; and with ambitious aim
Against the throne and monarchy of God
Raised impious war in Heav'n, and battle proud
With vain attempt. Him the Almighty Power
Hurl'd headlong flaming from th' ethereal sky
With hideous ruin and combustion down
To bottomless perdition, there to dwell
In adamantine chains and penal fire,
Who durst defy the Omnipotent to arms."

Shortening Records on Appeal

A Report to the New York Judicial Council

HARRY D. NIMS

THE UNDUE LENGTH of the printed record on appeal is a serious matter and of widespread interest to litigants and counsel alike. In a recent informal survey, the clerks of the four Appellate Divisions of the Supreme Court of the State of New York estimated that approximately 60% of the records on appeal in civil cases in their courts contained more than one hundred printed pages.[1] The proportion of records on appeal to the Court of Appeals of the State of New York containing more than one hundred printed pages was estimated by the clerk of that court at 53%. It is perhaps fair to say that 55% of the printed records in all civil cases in the appellate courts of New York State contain more than one hundred pages, and often such records contain several hundred and even thousands of pages.

The present lengthy printed record on appeal involves exorbitant printing costs to litigants. The Judicial Council pointed out, in 1937, that the cost of printing records on appeal in New York State for a ten year period was estimated at $19,000,000.[2] The average cost of printing a record on appeal has been estimated at $231.90.[3] Concerning this aspect of the problem, the Committee on Simplification and Improvement of Appellate Procedure of the American Bar Association states:[4]

"Excessive costs of appeals not only diminish the net value of the services rendered by appellate courts and deter parties from recourse to them, but they discourage resort to the trial courts, because every trial involves the possibility of an appeal. In a social system like ours, where free access to the courts is indispensable to the preservation of individual liberty and security, no unnecessary burdens should be placed upon the use of judicial remedies."

In addition to wasting the funds of litigants, a lengthy record increases the burden of appellate judges. Many records are so voluminous as to make it impossible for judges to read even a small part of them, in the time at their disposal. Where this occurs much of the cost of printing is wasted. It is said that the printed record in a recent case heard by the Court of Appeals of the State of New York was so voluminous as to require an entire car to transport the required number of copies from New York City to the Court at Albany.[5] The futility of the material in many records is demonstrated by the substantial number of appeals decided at or shortly after the close of the argument.[6]

Libraries which file records and briefs on appeal for purposes of legal research are faced with the problem of housing these records; and this problem is acute. For example, the bound records and briefs ("cases and points") in the library of the Association of the Bar of the City of New York total 31,284 volumes.[7] At a conservative estimate of an average thickness of three and a half inches per volume, these volumes occupy 9,125 feet of shelf space. Concededly, more than half of the pages in these volumes consist of records rather than briefs.

A shortened form of records on appeal would save a vast amount of paper.

[Mr. Nims here describes in detail the present method in New York of preparing the record on appeal from a judgment, and efforts heretofore made to shorten the record. In 1935, on

Editor's Note: Mr. Nims is a member of the Judicial Council of the State of New York. This article is a memorandum written by Mr. Nims for the Judicial Council. Its full title was "Shortening Records on Appeal in Civil Cases in the Appellate Courts of the State of New York." It has been somewhat shortened here, as indicated by the bracketed paragraphs on pages 73-74 and 77-78.

1. Practically without exception the records on appeal which contained more than one hundred pages involved appeals from judgments rather than from orders.

2. Third Annual Report of the Judicial Council (1937) p. 303.

3. New York Law Society, Some Aspects of Appeals (1934), pp. 9, 22-25. This figure was based upon 186 appeals from money judgments rendered in the Supreme Court, N. Y. County.

4. 63 Am. Bar Assn. Reports (1938), p. 605.

5. *Blaustein* v. *Pan American Oil Co.*, 263 App. Div. 97, 31 N. Y. Supp. (2d) 934 (1st Dept., 1941); case pending in the Court of Appeals.

6. In an editorial, "Oral Arguments and Voluminous Records on Appeal," appearing in the New York Law Journal (July 23, 1943) it was estimated that 90% of all appeals argued were decided at the end of the arguments.

7. For the Court of Appeals (1848-1944) and its predecessor court (1836-1848), 8,752 volumes; for the four Appellate Divisions (1896-1944), 22,532 volumes.

recommendation of the Judicial Council, Rule 232 of the Rules of Civil Practice, supplementing Section 576 of the Civil Practice Act, was amended to provide that "a case must contain so much of the evidence and other proceedings upon the trial as is material to the questions to be raised upon the appeal *and no more. . . .*" This has been repeatedly sustained by the courts, and Mr. Nims quotes from two Appellate Division opinions to that effect, but it has nevertheless been almost completely disregarded by both bench and bar.[8]]

APPENDIX METHOD A PRACTICAL SOLUTION

A possible solution of the problem is suggested by the experience of various appellate courts with the so-called "appendix method" to which the Judicial Council directed attention in 1937.[22]

Generally speaking, the appendix method consists of transmitting to the appellate courts a typewritten copy of all the papers, proceedings and evidence of the trial and of printing as an appendix to the brief (*i.e.*, matter bound together with the brief) or supplement to the brief (*i.e.*, matter bound separately from the brief) only so much of the typewritten matter as is material to the questions presented by the appeal.[23]

When the Federal Rules of Civil Procedure became effective in 1938, the United States Circuit Court of Appeals for the Fourth Circuit (Richmond, Va.) adopted what is known as the appendix method. Since that time, four other United States Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia have adopted some form of this procedure, as has the Supreme Court of Wisconsin.

In outline, this system works as follows: An appellant taking an appeal from a United States District Court to a Circuit Court of Appeals files a notice of appeal in the office of the clerk of the District Court[24] together with a bond for costs in the sum of two hundred and fifty dollars.[25] To obtain a stay of execution pending appeal, he gives a supersedeas bond.[26]

Under the Federal Rules of Civil Procedure (chiefly Rules 75 and 76) the record on appeal which is transmitted from the district court to the circuit court consists of a typewritten copy of what would be known in New York as the "judgment roll" and the "case." More specifically, this record consists of typewritten copies of the verdict or findings of fact and conclusions of law, the opinion, if any, the judgment or parts thereof appealed from, the notice of appeal, and designated or stipulated portions of the proceedings and evidence[27] and any statement by the appellant of the points on which he intends to rely that may have been filed.[28] The appellant and the appellee may (and frequently do) stipulate the contents of this typewritten copy of the "record, proceedings and evidence"[29] to be included in the record on appeal, or, under certain circumstances covered by Rule 76, the parties may submit an agreed statement of facts. However, the usual procedure is for the appellant to file and serve upon the appellee a designation of the portions of the "record, proceedings and evidence" to be contained in the typewritten record.[30] The appellant may designate the complete record and

8. Footnotes 8 to 21, consisting largely of references to New York practice, are omitted along with the portion of the text here summarized.

22. Third Annual Report of the Judicial Council of the State of New York (1937) p. 308.

23. For a general discussion of the appendix method, see Longsdorf, "Record on Appeal in Civil Cases in Federal Courts—An Analysis of Methods," (April 1943) 26 J. Am. Jud. Soc., 179-183.

24. Fed. Rules Civ. Proc., Rule 73 (b).

25. Fed. Rules Civ. Proc., Rule 73 (c). No bond is required in appeals *in forma pauperis* and certain other cases

26. Fed. Rules Civ. Proc., Rule 73 (d).

27. If any evidence or proceedings at a trial which was stenographically reported be designated for inclusion in the record two copies of the reporter's transcript of the portions designated by either party must be filed in the district court (Rule 75 (b)). However, testimony of witnesses may be in narrative form. In actual practice, however, in the Fourth Circuit, the appellant has the reporter make an original and four typewritten copies of his transcript of the evidence. The original is filed with the clerk of the district court and is included in the typewritten record transmitted to the Circuit Court of Appeals, one copy is kept in the district clerk's office, another copy is used by the appellee, the third copy is kept by the appellant, and the fourth copy is used in the event an application for certiorari to the Supreme Court of the United States is made. (Brochure, "The Remarks and Comments of Claude M. Dean on Rule 10 Before the North Carolina Bar Association, etc." June 28, 1940 (privately printed) pp. 21-22).

28. Fed. Rules Civ. Proc., Rule 75 (g).

29. The Federal Rules of Civil Procedure refer to two "records"—"record" herein referred to obviously is the judgment roll. The "record on appeal" referred to in the same rule refers to all the papers which are forwarded to the circuit court of appeals.

30. Fed. Rules Civ. Proc., Rule 75 (a).

all the proceedings and evidence in the action, but if he designates less than the complete record he must serve, with his designation, a concise statement of the points on which he intends to rely on appeal.[31] Concerning this phase of the federal practice, Professor Edson R. Sunderland has stated:

"The Federal Rules contemplate an early designation of points relied upon only where the appellant proposes to carry less than the entire proceedings of the trial court into the court on appeal. In such a case the opposing party ought to know what points are to be raised in order to determine what other parts of the proceedings he should ask to have added to the record on appeal. Otherwise the appellant is not required to decide what points he will rely upon until he finally prepares and files his brief and argument."[32]

This typewritten record on appeal, it should be emphasized, gives the appellate court one copy of the complete papers used below as well as the complete reporter's transcripts of proceedings at the trial and evidence at the trial, unless one of the methods for shortening it, as outlined above, is used.

Rule 75 of the Federal Rules of Civil Procedure authorizes the circuit courts of appeals to make their own rules as to whether this typewritten record on appeal, as above prepared, or any part should be printed.[33] It is this provision of the Federal Rules which has permitted experimentation by these courts with the appendix method.

The appendix method is not new. However, the first federal appellate court to use it was the Circuit Court of Appeals for the Fourth Circuit (Richmond, Va.), which as stated above adopted it on June 21, 1938,[34] after study by the judges of the court and full discussion by the Federal Judicial Conference for the Fourth Circuit. Rule 10 of the Rules of the Fourth Circuit, which provides for the use of the appendix procedure, is given in full in the footnote.[35] It operates as follows:

Within forty days from the date of the notice of appeal the clerk of the District Court files the typewritten record on appeal with the clerk of the Circuit Court of Appeals. Within ten days thereafter the appellant must furnish the appellee with a statement of those parts of the record he proposes to print as an appendix or

31. Fed. Rules Civ. Proc., Rule 75 (d).

32. "A simplified System of Appellate Procedure," (Feb, 1943) 17 Tenn. L. Rev. 651, 661.

33. Fed. Rules Civ. Proc., Rule 75 (1).

34. It became effective Sept. 16, 1938, the same date on which the Federal Rules of Civil Procedure became effective.

35. Rule 10:

Printing of Records and Briefs—Contents of Briefs

1. Unless ordered by the court, it shall not be necessary to print the record on appeal or on a petition for review of or enforcement of an order, except that the appellant or petitioner shall print as a part of the supplement or appendix to his brief the judgment, decree or order appealed from or sought to be reviewed or enforced, together with any opinion or charge of the court, board or commission. If the record is printed, without order of court, the cost of printing shall not be taxed as costs in the case except in cases where for special cause shown the court shall otherwise order.

2. The Brief of the appellant or petitioner shall contain:

(a) An index and table of citations with cases alphabetically arranged. Where state statutes are relied on they shall be copied in the brief.

(b) A brief statement of the case together with a succinct statement of the questions involved, separately numbered, and the manner in which they are raised in the record.

(c) A clear and concise statement of the facts, with reference to the pages of the typewritten or printed transcript where there is any possibility that the other side may question the statement. Where portions of the testimony are printed in an appendix to the brief or supplement to the brief as permitted by section (e) hereof, the reference may be to such printed testimony.

(d) Argument in support of the position of appellant or petitioner.

(e) An appendix (or supplement to the brief) which, in addition to what is set out in section 1 above, shall contain such parts of the record material to the questions presented as the appellant or petitioner desires the court to read. Stars or other appropriate means should be used to indicate omissions in the testimony of witnesses, reference to the pages of the transcript should be made and the names of the witnesses should be indexed.

3. The appellant or petitioner, within ten days after the filing of the transcript of the record in the clerk's office of the court, shall furnish appellee or respondent, or his counsel, with a statement of the parts of the record he proposes to print with his brief pursuant to this rule.

4. The brief of appellee or respondent shall contain:

(a) An index and table of citations with cases alphabetically arranged. Where state statutes are relied on they shall be copied in the brief.

(b) A statement of the case and of the points involved, if the appellee or respondent disagrees with the statement of appellant or petitioner.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's or petitioner's brief in so far as it is deemed erroneous or inadequate, with reference to pages of the typewritten or printed testimony.

(d) Argument in support of the position of appellee or respondent.

(e) An appendix (or supplement to the brief) containing such parts of the record as he desires the court to read, and as have not been printed in the brief of

supplement to his brief.[36] Twenty days before the term at which the case is docketed for hearing the appellant files a printed brief.[37] This brief must contain an index, a brief statement of the case, together with a succinct statement of questions involved (separately numbered) and the manner in which they are raised in the record; a clear, concise statement of the facts with references to the testimony printed in the appendix or supplement to the brief and if not so printed, to the reporter's tyepwritten transcript of the evidence or other proceedings; the arguments in support of appellant's position; and, finally, the printed appendix,[38] or supplement. This appendix or supplement to the brief contains the judgment of the court below, any charge, findings or opinion, and such other parts of the record, proceedings and evidence as is material to the questions presented.

The appellee files his brief five days before the term at which the case is docketed,[39] which may include a similar appendix in which he prints such parts of the records, proceedings and evidence as he desires the court to read and as have not been printed by the other side in its appendix or supplement. The brief (not including the appendix or supplement to the brief) may not exceed fifty pages in length except with permission of the court. Three days before the date set for argument, appellant may file a reply brief if necessary by reason of the contents of the appellee's appendix with which he may print additional parts of the record.

If the appellant prints, without a court order, the whole record on appeal, the cost of printing such record is not taxable.[40] The cost of printing the brief and the appendices or supplement is taxable, but if in the opinion of the court unnecessary matter has been printed therein, the court may withhold or divide costs as justice may require.[41] "The success of the rule is the enforcement of its requirements."[42] On several occasions the Circuit Court of Appeals for the Fourth Circuit has penalized parties for violating its Rule 10 by printing unnecessary matter.[43]

On the application of either party the court may order further parts of the record printed.

The appendix method as set forth in its Rule 10 has been consistently used in the Fourth Circuit for approximately six years and the judges of that court express complete satisfaction with it, permitting practically no exceptions to its use. Senior Circuit Judge, John J. Parker,[44] and the clerk of the court are enthusiastic in their advocacy of the plan.

Mr. Claude M. Dean, the clerk of the court, states that

"* * * statistics in the Clerk's office of the Fourth Circuit show that in 611 cases pending in this Court since the Rule became effective, the litigants in those cases have saved $184,488.50 in the printing of their records under this new Rule, and the Court has been saved many hours of valuable time in not having to read and consider 112,959 unnecessary pages of the records in those 611 cases.

"The number of typewritten pages contained in the transcripts of records in these 611 cases was 168,934 and the estimated cost of printing the same under the old Rule, at $1.50 per printed page, amounts to $253,401. Of these 168,934 typewritten pages contained in these records counsel under the Court's new Rule 10, only printed in the appendices to their briefs

appellant or petitioner. Stars or other appropriate means should be used to indicate omissions in the testimony of witnesses, reference to the pages of the transcript should be made and the names of the witnesses should be indexed.

5. The appellant or petitioner may file a reply brief and may set forth in an appendix thereto such parts of the record as he may wish the court to read in view of the parts printed by the appellee or respondent.

6. Briefs shall not exceed fifty printed pages in length except by special permission of the court; but this limitation shall not apply to the appendices or supplements to the briefs hereinbefore provided for.

7. Briefs, other than appeals *in forma pauperis*, shall be printed and the cost of printing same, with the appendices or supplements to the briefs hereinbefore provided for, in an amount not exceeding $1.50 per printed page, shall be taxed as costs in the case; provided that, when in the opinion of the court unnecessary matter has been printed, it may withhold or divide costs as justice may require.

36. Rules Cir. Ct. of Appeals, 4th Cir., Rule 10 (3).
37. Rules Cir. Ct. of Appeals, 4th Cir., Rule 12.
38. Rules Cir. Ct. of Appeals, 4th Cir., Rule 10 (2), a to e.
39. Rules Cir. Ct. of Appeals, 4th Cir., Rule 12 (1).
40. Rules Cir. Ct. of Appeals, 4th Cir., Rule 10 (1).
41. Rules Cir. Ct. of Appeals, 4th Cir., Rule 10 (7).
42. Letter, dated May 20, 1944, to the Judicial Council from Mr. Claude M. Dean.
43. *American Surety Co.* v. *First Nat'l. Bank of West Union*, 141 F. (2d) 411 (1944); *Mutual Life Ins. Co.* v. *Blodgett*, 126 F. (2d) 273, 279 (1942); *Pickett* v. *Aglinsky*, 110 F. (2d) 628, 632 (1940); *U. S. Galvanizing & Plating Equipment Corp.* v. *Hanson-Van Winkle-Munning Co.*, 104 F. (2d) 856, 863 (1939).
44. "This [the appendix method] saves expense to litigants and labor on the part of both court and counsel. It eliminates the most fertile sources of delay and leads to a better presentation and clearer understanding of the case." Parker, "Improving the Administration of Justice," (Dec. 1941) 27 A. B. A. J. 746, 748.

55,975 pages of the same, and the estimated cost of printing these pages at $1.50 per printed page is $68,912.50 which amount deducted from $253,401 which would have been the cost of printing under the old Rule, shows the enormous saving of $184,488.50 to litigants in the expense of printing all of such parts of these records which counsel considered material to the questions presented on their appeals, and which they desired the Court to read."[45]

USE IN OTHER FEDERAL CIRCUITS

Similar rules[46] have been adopted by the Circuit Courts of Appeals for the First, Second, Third and Eighth Circuits and the United States Court of Appeals for the District of Columbia.

The appendix system as used by the Third Circuit Court of Appeals (Philadelphia, Pa.) is contained principally in Rules 26 and 27 of that court. It was adopted on February 14, 1940 and became effective on March 1, 1940. The system has been highly successful in this circuit. Senior Circuit Court Judge John Biggs wrote to the Judicial Council on May 10, 1944:

"* * * I am so heartily in favor of the [appendix] rule that I would like to see it adopted throughout all the metropolitan areas and particularly by courts which are heavily ladened and sometimes overburdened with business."

Mr. Rowland, the clerk of that court, states that since the appendix method became effective, the court has permitted litigants to print the entire record in only three or four cases; that in 40% to 50% of the cases, the record as printed by the appellant has been so accurate and complete that the appellee has found it unnecessary to print any part of the record as an appendix to his brief. Although there is no specific provision made in the rules for such a practice, counsel in cases in the Third Circuit often agree upon the parts of the record which they consider necessary to the appeal, which they print generally in one volume. This is done prior to the printing of the briefs so that reference can be made to this short record by page number in the briefs. This practice is highly favored by the court, but the court is of the opinion that it would be impractical to provide by rule that such joint appendix must be used in all cases.

A permissive appendix procedure became effective in the Circuit Court of Appeals for the First Circuit (Boston, Mass.) on September 20, 1940. Under Rule 24 of that court, in cases in which the court may so order, the appellant presents as an appendix to his brief, the judgment, decree or order appealed from or sought to be reviewed or enforced, the opinion or charge of the court or administrative agency, "the relevant docket entries, and such parts of the record material to the questions presented as the appellant or petitioner desires the court to read. * * * The appellee or respondent may in like manner print as an appendix to his brief such parts of the record as he desires the court to read, which have not been printed in the appendix to the brief of the appellant or petitioner." On December 31, 1940 the United States Court of Appeals for the District of Columbia adopted this procedure. Rule 17 of this court, which makes the appendix method mandatory, became effective on February 1, 1941.

Thomas M. Huff of the Division of Procedural Studies and Statistics of the Administrative Office of the United States Courts recently made a study of the records on appeal for the first hundred cases in this court under the new rule. He found that the average cost of printing the record on appeal had been reduced nearly two-thirds.

"If the old rule had not, itself, provided for a substantial reduction of the record in printing, the contrast would have been still more striking. * * * "

[Mr. Nims here reproduces statistical tables previously printed in this JOURNAL[47] showing

45. Dean, "Proposed Rules of Criminal Procedure," (March 1944) 3 Fed. Rules Decisions 357, 358-359. For an earlier analysis of the appendix system see, Dean, Claude M. "Fourth Circuit Rule 10 Reduces Brief Printing Costs" (Feb. 1943) 26 J. Am. Jud. Soc. 148-150.

46. Essentially these rules are the same but there are differences in detail. For example, in the Eighth Circuit the appendix contains material (Rule 10 (b) of the Eighth Circuit Rules) which in the Fourth Circuit is found in the brief proper (Rule 10 (2) (c) of the Fourth Circuit Rules). The Third Circuit Rules specify the colors of the covers of the briefs as well as the information that shall appear thereon (Rule 26 (1) of the Rules of the Third Circuit) while the Fourth Circuit Rules do not mention covers at all. Differences such as these may be multiplied but the essential characteristics of the appendix method appear in the rules of all the above mentioned circuits.

47. "Appendix Method Successful in District of Columbia" (Aug. 1943) 27 J. Am. Jud. Soc. 55, 56. This article is a condensation of Mr. Huff's report, dated July 2, 1942, to the Director of the Division of Procedural Studies and Statistics of the Administrative Office of the United States Courts.

that in one hundred cases prior to adoption of the rule the average printing cost was $219.94 per case and $1.18 per page of typewritten record, as against $159.08 and $.44 for a similar group of cases under the appendix method.]

The clerk of this court states that the bar, now that they have become accustomed to the appendix system, are enthusiastic about it and would not like to go back to the old system of printing the record. The clerk of this court customarily sends a form letter to the attorneys for appellant and appellee in all appeals filed in his court, suggesting that they arrange to print in one volume the parts of the record they wish to have before the court. This procedure proximates the procedure followed in the Third Circuit, see above, and is generally followed.

The use of the appendix system was authorized by the Circuit Court of Appeals for the Eighth Circuit (St. Louis, Mo.) on May 31, 1942. The procedure adopted by this court is found in Rules 10 and 11 of its Rules. In a note appended to Rule 10 this court states:

"The purpose of Rule 10 is to confine the printed record on appeal to essential matter and thus to reduce the cost of printing and to relieve the court of the burden of separating what is inconsequential from what is pertinent to the question argued. While necessarily the burden of preparing the printed record is placed upon the appellant or petitioner, it is expected that all counsel interested in a case will cooperate to the end that the printed record will present only so much of the entire record as is essential, but will fairly and adequately present that."

In November 1943 the United States Circuit Court of Appeals for the Second Circuit (New York, N. Y.) adopted its Rule 22 which makes the appendix system optional in that court. Thus far only two records have been prepared under the rule.

EXPERIENCE IN WISCONSIN AND CALIFORNIA

The Supreme Court of Wisconsin adopted the appendix method for civil and criminal appeals on June 10, 1942. The procedure as now used in this court is set forth in Rules 6-10 of the Rules of Practice.[48] These rules became effective on July 1, 1942, but not obligatory until January 1, 1943. Because the problems faced by the Wisconsin courts prior to 1943 are so closely analogous to our present problems, it is deemed of sufficient importance to set forth in detail Wisconsin's appendix method and experience with this new practice. The following comments by this court are of interest.

"By the revision of the Rules of Practice [of the Supreme Court] it is sought to achieve two main objectives. (1) To reduce the amount of printing required on appeal, and (2) to improve the presentation of the facts and the law to the court by modifications of the brief.

"The revision of the rules is an adaptation to our practice of the rules which have been in force in the United States circuit court of appeals for the Fourth circuit for some years where both of the objects stated have been attained. The cost of printing in that circuit for one term was reduced by two thirds. It is not supposed that so great a saving can be made in the printing of appeals in this court. However, there is no doubt that a very substantial saving can be made at the beginning, and that with a better understanding and a little practice under the revised rules, the amount of saving can be materially increased."[49]

Under the appendix method, the briefs are in essentially the same form as under the previous practice.[50]

"The most radical departure from the former rules made by the revision is the requirement that the appellant shall print an appendix, thus doing away with the printing of what has heretofore been known as 'the case.' If the spirit of former Rule 6 which required printing of so much of the record as was necessary to present the questions for decision had been followed by counsel in the preparation of cases, an amendment would not have been necessary. However, over the years a practice has grown up of printing practically everything found in the return made by the clerk of the trial court, including notices of trial, summons, subpoenas, depositions, and many other documents having no bearing upon the determination of the appeal. Many of the facts in a case are undisputed. It is sufficient to state those facts in the briefs. It is not necessary to print in the appendix the testimony as to such facts. The court will scan appendices rather closely to see that they comply with this rule.

"While the court will, until the rule is fully understood, be lenient in the enforcement of penalties; nevertheless in cases where there is not a good-faith attempt to comply with the

48. These rules may be found in 240 Wis., pages viii-xi.

49. Comment on Revised Rules, 240 Wis., xviii-xxiii.

50 Id. at xix.

rule, the penalty will be imposed. The court is itself somewhat responsible for the condition which obtained under the former rules because it did not require compliance therewith. . ."[51]

The mechanical problems involved in the revised practice are referred to thus:

"Correspondence with printing establishments in Richmond, Virginia, where the revision has been in effect for some years, indicates that there is no difficulty from a mechanical standpoint in preparing the brief and appendix. The appendix is first paged and printed. That enables the writer of the brief to refer to the appendix in the same way that he would have referred to a 'case.' It is suggested that it would be a desirable practice to commence the paging of the brief with 1 and continue to 100; that the first page of the appendix be 101 and the paging continued. If that system were followed the reader would always know whether a reference was to a brief or to an appendix. There are comparatively few cases where a brief of more than one hundred pages is required. In such cases the paging of the appendix might begin at 201. After the brief is prepared and printed, the brief and appendix should as the rule requires, be bound in one volume unless the appendix exceeds one hundred pages in length."[52]

Some time thereafter in evaluating the new appendix method practice, the Supreme Court of Wisconsin said:

"One of the objectives sought to be attained by the adoption of the new rule was to diminish the expense of printing, which in many instances had come to be a considerable item. A comparison has been made between the first seventy-five cases heard on the January, 1942 calendar with the first seventy-five cases on the January, 1943 calendar. The total pages in 1942 were 12,470. The total pages for 1943 were 8,273, a reduction of 32.8 per cent, or 4,197 pages, a substantial saving at $1 per page. This is thought to be a fair comparison. While the rules went into effect July 1, 1942, they were not obligatory until the commencement of the January, 1943 term. The members of the court have also found the briefs much more helpful and usable than formerly. On the average, they contain much less immaterial matter and the arrangement is more satisfactory."[53]

The results of the operation of the appendix method in Wisconsin are convincing arguments in its favor.

California has used the appendix method since 1907.[54] However, in 1928, section 3 of Rule VIII of the Rules of the California Supreme Court made it a sufficient compliance with the requirement that the brief append such portions of the record as the parties desired to call to the attention of the appellate court, to state the "substance" of those portions of the record with reference to the line and page of the type written transcript for verification. "As a result, the practice of appending large, or indeed any portion of the transcript to the brief, seems to have been abandoned."[55]

Later the Judicial Council of California, under its rule making power, adopted comprehensive new rules governing appeals, effective July 1, 1943 which go even further than the appendix method. Under the new rules it is no longer necessary to print even an appendix. The court will use the typewritten record on appeal. It is still necessary to print the brief, and the parties *may* print a supplement thereto. "But the supplement will only be used at the election of counsel as an aid to effective argument, and not as a required duplicate of the record. Appellate lawyers should feel a sense of relief, and the courts will scarcely notice the change; they will look at the typewritten record a little more often, and just about as successfully as they do now."[56]

A system as far-reaching as the present California system in effect would frequently result in there being no printed record at all.

The recent experience of the above federal and state courts seems to indicate that a modified form of the appendix system offers the most practical improvement so far devised. While in any system other than that permitting the printing of the whole record, additional work on the part of the attorneys is inevitable, the appendix system has demonstrated that in records of moderate length the work

51. The comments of the court on Wisconsin's former practice might have been written of the present New York practice.

52. Id. at xxi.

53. 242 Wis., pages VI-XII, at page X, comment undated. This volume contains decisions dated Dec. 8, 1942 to April 13, 1943.

54. C. Civ. Proc., § 953 (c).

55. Marasse, "The Narrative Statement and the Reporter's Transcript Compared as Methods of Bringing Up Evidence on Appeal" (May 1942) 30 Cal. L. Rev. 457.

56. B. E. Witkin (draftsman of the new Rules on Appeal) "New California Rules on Appeal" (Jan. 1944) 27 So. Cal. L. Rev. 79, 136.

involved in eliminating the portions not to be printed should be nominal. In larger records, the extra labor will be more than compensated for by the saving in printing costs, paper and space even though it is cheaper to hire printers than lawyers.

SUMMARY OF PROPOSALS

A. *The Appendix Method:*

The printed record on appeal in New York could be simplified and shortened by a procedure embodying the best features of the various forms of the appendix method. The following are submitted as possible provisions to be included in any new procedure governing the preparation of records.

The entire judgment roll, proceedings and evidence at the trial shall not be printed unless ordered by the appellate court. Within a time to be specified by rules of court, the appellant shall file in the office of the clerk of the appellate court a typewritten copy of the papers comprising the judgment roll, together with a typewritten copy of the stenographer's transcript of the proceedings and evidence at the trial. At a time thereafter to be specified by rules of court, the appellant is to serve on the respondent a printed appendix which he is to attach to his brief or file in a separate volume, together with a typewritten copy of the stenographer's transcript of the proceedings and evidence at the trial. In printing such appendix the appellant is to print, not only the portions of the record supporting the points to be raised by him on appeal, but all material essential to enable the appellate court to pass upon all questions raised by the appeal and no more.[57] In addition, the appellant shall print, at the outset of his brief, a statement setting forth each question involved in the appeal, in the briefest and most general terms, without dates, amounts or particulars of any kind. Each such question is to be followed immediately by an answer stating whether or not it was affirmed, negatived, qualified or not answered by the court below. The respondent may insert at the outset of his brief a similar statement if he disagrees with the statement made by appellant. Further, it shall be provided that, ordinarily, the appellate court will consider no point which has not been set forth according to this rule or as necessarily suggested by the statement of questions involved.

A rule of this sort has long been used by the Supreme Court of Pennsylvania and is held in high esteem by that court. The rule itself states that "This rule is to be considered in the highest degree mandatory, admitting of no exceptions." This is the rule:

"Rule 50. The statement of the questions involved must set forth each question separately, in the briefest and most general terms, without names, dates, amounts or particulars of any kind, and whenever possible, each question must be followed immediately by an answer stating simply whether it was affirmed, negatived, qualified or not answered by the court below. If a qualified answer was given to the question, appellant shall indicate, most briefly, the nature of the qualification; or if the question was not answered and the record shows the reason for such failure, the reason shall be stated briefly in each instance without quoting the court below. The questions and answers in their entirety should not ordinarily exceed twenty lines, must never exceed one page, and must always be printed in type at least as large as point 10, on the first page of the brief, without any other matter appearing thereon. This rule is to be considered in the highest degree mandatory, admitting of no exception; ordinarily no point will be considered which is not thus set forth in or necessarily suggested by the statement of questions involved."

Chief Justice Maltbie of Connecticut terms a similar practice there as of "very great value."[58]

The respondent may serve an answering brief which may include an appendix or supplement containing such parts of the record as were not printed by the appellant but which

57. "I think that this suggests too much printing. The court has before it the entire record in the case, and it is not necessary for counsel to print the record bearing on facts as to which there is no dispute. The fact is that dispute over the basic facts has been pretty well eliminated by the time the case reaches the appellate court, and ordinarily it is not necessary for the court to do more than read counsel's statement of the facts to get a complete and thorough understanding of the facts necessary to be considered on appeal. It is only where there is a dispute as to the facts that the record need be printed, and then it should relate only to the disputed matter." Comment by Judge John J. Parker, Senior Circuit Judge of the Fourth Circuit Court of Appeals, in a letter to the author, July 14, 1944.

Parties should be encouraged to print a joint appendix, as in the Third Circuit and the District of Columbia (see *supra.*)

58. 63 Am. Bar Assn. Reports (1938) p. 608.

the respondent deems essential to the points on appeal.

The appellant may file a reply brief to which he may append additional material from the record, if new matter printed by respondent so requires.

It shall not be necessary that the trial judge settle the record unless there is a dispute concerning it.

B. Other Methods Which May Be Employed to Shorten the Present Records on Appeal:

1. The printed portion of the page of the record which now is seven inches by three and one-half inches[59] should be enlarged to seven and one-sixth inches in height and to at least four and one-sixth inches in width, the size used in the Supreme Court of the United States[60] and in all of the United States circuit courts of appeals. California made this change in its new Rules on Appeal.[61] A printed page seven and one-sixth by four and one-sixth inches contains approximately 385 words. The present page used in New York records averages about 285 words. This one change would decrease the size of the New York records by approximately one-fourth.

2. Folio numbers should be eliminated.[62] They serve no purpose which justifies what they cost. These numbers, which Rule 235 requires to be printed, occupy about three and one-half square inches of each page. If they were eliminated, the over-all size of the pages, now ten and one-half by eight inches, could be reduced to nine and one-quarter by six and one-eighth inches, the size page used in the Supreme Court of the United States and all the Circuit Courts of Appeals. This would save paper and reduce the cost of printing. Folio numbers are not required by the Supreme Court of the United States or by the circuit courts of appeals, although folio numbers in the outer margins or indented in the main body of printed matter are sometimes used in records in these courts.

If folio numbers are eliminated and the space thereby saved be filled with printed matter, the width of the printed page, which has been recommended (four and one-sixth inches) could be increased still further. Law printers state that present linotype equipment can be used for printed pages up to five inches in width. A five-inch printed page is used in the records on appeal in the Supreme Court of Canada, in the Supreme Judicial Court of Massachusetts, and elsewhere. However, if the over-all size of the page is reduced, it would not be feasible to increase the length of the printed line to five inches.

3. Extension and tabular printing of attorneys' and notaries' names, addresses and descriptions constitute a needless lengthening of the record and should be eliminated. The existing practice is illustrated by the following excerpt from the end of a document printed in a recent record in the Court of Appeals.

"Yours etc.,
X, Y, Z,
per A. M.
Attorney for Plaintiff,
306 City Hall
————————, N. Y."

Here are six lines of printed matter which if "run in" could be reduced to two lines, or better still, the words "Attorney for Plaintiff" would suffice, for the name and address of the plaintiff's attorney appears in every judgment roll. Further, the repetition of names, signatures and addresses, such as those of the attorneys, that appear on papers served in the case should be forbidden. In the aggregate, these practices waste hundreds of pages annually. Provisions along the line of the above suggestion may be found in Rule 234 of the Rules of Civil Practice. Those present provisions should be extended to include the foregoing.

4. In printing testimony, the answer to a question should follow immediately without beginning a separate paragraph unless the question has ended at the conclusion of a line. This is the rule in several of the federal appellate courts.[63] The present records exhibit a gross waste of space in printing arrangement.

RECAPITULATION

1. A form of the appendix method embodying the experience of the various courts which have been using it in the past five years could

59. R. C. P. 235.
60. Rule 26 of the Rules of the Supreme Court of the United States.
61. Rule 9.
62. R. C. P. 235; Rules V and VIII of the Rules of Practice of the Court of Appeals.
63. U. S. Court of Appeals for the District of Columbia, Rule 17 (e) (6).

be adopted and made applicable to all appeal records in the courts of the state with very great advantage to litigants and to appellate courts.

2. The rules covering an appendix method should contain very definite and specific penalty clauses. Experience has shown that the bar is slow to adopt changes if made optional, and the natural opposition of the profession to change tends to militate against the use of any new methods unless made compulsory and enforced.

3. A rule that counsel must insert in briefs a very concise summary of the question to be raised on appeal has tended definitely to simplify and shorten the record and to lessen the work of the appellate courts and should be adopted here.

4. The size of the printed portion of the page of records should be enlarged and this would substantially increase the amount of material per page and so reduce the number of pages used by at least one-fourth. The overall size of the page should be reduced to conform to the size used in records on appeal to the United States Supreme Court.

5. Folio numbers should be eliminated.

6. The printing of unnecessary exhibits and papers and unnecessary parts thereof, and the repetition of signatures and addresses of counsel should be forbidden. Tabular printing of names and addresses should be eliminated. Answers to questions in testimony should not begin new paragraphs.

The Declaratory Judgment

C. S. POTTS

WHAT IS THE declaratory judgment? No doubt most of you are familiar with it. The declaratory judgment statute empowers the court to enter a final judgment between litigants, defining their respective rights in the subject matter, without attaching to that judgment any consequential or coercive relief. It proceeds on the theory that men in their business relations are generally honest, and that they are willing to discharge their obligations when they are authoritatively informed as to what those obligations are. The court merely declares the rights of the litigants upon formal petition or complaint, just as in other suits, but does not assume that force will be needed to make its decision effective. If on subsequent complaint it appears that the defeated party has refused to perform, the court issues execution or other proper compulsory process as a matter of course, and that, too, of course, without opening up the matter on its merits. All that has to be shown in such a motion is that judgment has been declared, that the defendant has not performed, and, therefore, that the plaintiff is entitled to have execution issued.

This process, it will be noted, is a distinct departure from the usual procedure at common law and under statutes based on the common law. With some exceptions, the machinery of the courts in common law jurisdictions can only be set in motion when a wrong has actually been committed or is immediately threatened. Salmond has said:

"The law will not enforce a right except as against a person who has already violated it, or who has at least already shown an intention of doing so. Justice is administered only against wrongdoers, in act or in intent."

Now, that is the general theory. Of course you are all familiar with the principle: a right, a wrong, and then a remedy; in other words, that under our present procedure there must be an invasion of the rights of the plaintiff before he has a cause of action.

It follows that under the old procedure, if A and B differ as to the meaning of a contract, or a deed, or a lease, or a will, one of them must act upon his interpretation of it and run the risk of incurring a heavy liability to the other, before the court will take jurisdiction and inform them of their rights. But by means of the declaratory judgment, without incurring such risks either A or B has a right to go into a court and ask for an interpretation of the instrument. He has a legal right to know his

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Editor's Note: The author is dean of the law school of Southern Methodist University. This was an address before the Bar Association of Dallas, May 20, 1943, and is reprinted from that Association's 1943 year book, *The Dallas Bar Speaks.*

legal rights. With both parties present before the court, and with the parties having a substantial interest in the subject matter and each contending for his own interpretation of the instrument, the court has before it a real case or controversy and its decision on the issues presented is final as between the parties.

The advantages of this form of procedure are obvious. In the first place, the issues presented to the court for its decision are usually simple and there are few if any issues of fact. A contract or other written instrument, or a statute, is to be interpreted, and the cases are often submitted on an agreed statement of facts. That fact enables the court in many cases to dispense with the services of a jury. Then, too, the controversy being in its initial stage, no wrong or violence has yet been committed, or if so, the plaintiff waives any injury he may have sustained as a result of such wrong, and only asks for a declaration of his rights for the future guidance of the parties. As a result, the court is relieved of all perplexing questions as to the amount of damages. And, most important of all, since no wrong is charged against the defendant and no damages are asked for, there is present in such a case a notable absence of the bitterness and hostility frequently present in ordinary damage suits, and the litigants are able to continue their business relations. In this way is obviated one of the most serious consequences of litigation under the old procedure, the loss of a good customer or business associate.

DISTINGUISHED FROM ADVISORY OPINIONS

I want to issue a warning that you shall not confuse the declaratory judgments with advisory opinions, so called. While a declaratory judgment is advisory in character, since it looks to the future and does not seek to redress past wrongs, it is not the same thing, and, in fact, is a very different thing from the advisory opinions that are provided for by a number of the constitutions of the New England states and some others. In the advisory opinion, a legislative body or an executive office is authorized to call upon the court to pass upon the constitutionality of a measure under consideration. There is no concrete case before the court, no res or rights of parties to be disposed of, no adversary parties, and usually no counsel, no oral arguments and no briefs. If any counsel at all appear, it is usually as *amici curiae*. They have only a general social interest in the result, and not a vital interest as the representative of a party whose property rights are at stake. As there are no parties, no one is bound. Such advisory opinions are not *res judicata*, and the courts, when concrete cases arise, do not hesitate to overturn them.

Thus, in *Opinion of the Justices*, 79 Atl. 490, the New Hampshire Supreme Court said: "Our opinions submitted under this constitutional provision are merely advisory and in no sense an adjudication of the question." (See also *Opinion to the Governor of Rhode Island*, 103 Atl. 513). On the other hand, in the case of the declaratory judgment, there is a *res* or rights of parties to be disposed of, there are adversary parties who are present in person or by attorney, and the court has the help of oral argument and briefs of counsel. As a result, the decision is *res judicata*, and all parties to the proceeding are bound by the declaration handed down by the court.

HISTORY OF THE DECLARATORY JUDGMENT

The modern declaratory judgment is said to be an evolution from Roman legal procedure. This form of procedure is found in a number of modern European states, and has been in use in Scotland for more than three hundred years.

In a celebrated case decided by the House of Lords in 1846, the case of the *Earl of Mansfield* v. *Stewart*, 5 Bell 136, 160, in which a negative declaration, or declaration of no right, was asked of the court, Lord Brougham pronounced the following encomium on this form of procedure:

"I cannot close my observations in this case without once more expressing my great envy, as an English lawyer, of the Scotch jurisprudence, and of those who enjoy, under it, the security and the various facilities and conveniences which they have from that most beneficial and most admirably contrived form of proceeding called a declaratory action. Here, you must wait till a party chooses to bring you into court; here, you must wait till possibly your evidence is gone; here, you have no means whatever, in ninety-nine cases out of a hundred, of obtaining the great benefit of this proceeding."

Lord Brougham lived to see the reform, for which he had labored for thirty years, introduced into England by the Chancery Procedure Act of 1852. It was further extended by the

Judicature Act of 1873, and by rules of court adopted in 1833, and 1893, until now declarations of rights may be given by a Division of the High Court of Justice to "any person claiming to be interested in any deed, will or other instrument." As a matter of fact, about 60 per cent of all actions in the Chancery Division are applications for declarations of rights, and an appreciable percentage of actions in the King's Bench Division are of this character.

In this country, New Jersey adopted a declaratory judgment statute in 1915. Several other states followed during the war years, and in 1920 the American Bar Association indorsed it and urged its adoption by the states. In 1922, the Commissioners on Uniform State laws approved a model Declaratory Judgment Act, which, according to their secretary has now been adopted in 31 states. A few additional states have adopted acts of their own drafting. The uniform bill is the one now pending at Austin.

CONSTITUTIONALITY OF THE ACT

The constitutionality of the state declaratory judgment acts has been upheld by the supreme court of every state in which the question has been raised. Michigan was, for a time, an exception to the rule, as the court of that state in the case of *Anway* v. *Grand Rapids Railway*, 211 Mich. 592, 179 N. W. 350, held the first act passed by that state void, but in the later case of *Washington-Detroit Theater Co.* v. *Moore*, 249 Mich. 673, 229 N. W. 618, a slightly modified form of the statute was upheld by a unanimous court.

In the United States Supreme Court there had been some unfavorable dicta, but finally the Uniform Declaratory Judgment Act of Tennessee was upheld by the Supreme Court in an opinion written by the present Chief Justice (*Nashville, Chattanooga, and St. Louis Railway Co.* v. *Wallace*, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730; 87 A.L.R. 1193 (1933). The following year Congress passed a Declaratory Judgment Act, applicable to the Federal Courts, and it was upheld in a unanimous decision written by Chief Justice Hughes, in the case of *Aetna Life Insurance Co.* v. *Haworth* 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A.L.R. 1000 (1937).

A few illustrative cases will help to make the subject more concrete. In *Insurance Co.* v. *Haworth*, just cited, defendant Haworth, a resident citizen of Missouri, held five insurance policies on his life issued to him by the Aetna Insurance Company of Connecticut, his wife being named in each policy as beneficiary. These policies provided for certain benefits to be paid to the insured if he should become permanently disabled, without further payment of premiums on his part. In 1935, he notified the company that he had become totally and permanently disabled. He ceased paying the premiums and demanded payment of the disability benefits provided for in the several policies. The insurer denied that the insured had become totally and permanently disabled, refused to pay the benefits, and asserted that the policies had lapsed for non-payment of the premiums. The insured persisted in his demand for the payment of the benefits but failed to bring suit to enforce his claims. Thereupon, the insurance company, wishing to settle the questions as to the validity of the policies and as to Haworth's total and permanent disability while the proofs were available, applied to the federal district court for a declaration to the effect that the insured was not totally and permanently disabled, and that, therefore, the policies had lapsed because of the non-payment of the premiums by the insured.

The federal district court dismissed the application on the ground that it did not present a "case" or "controversy." That action was approved by the circuit court of appeals, but was reversed by the supreme court, Chief Justice Hughes declaring:

"There is here a dispute between parties who face each other in an adversary proceeding. The dispute relates to legal rights and obligations arising from the contracts of insurance. The dispute is definite and concrete, not hypothetical and abstract. Prior to this suit, the parties had taken adverse positions with respect to their existing obligations. Their contentions concerned the disability benefits which were to be payable upon prescribed conditions. . . . Such a dispute is manifestly susceptible of judicial determination. It calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts."

Two recent cases admirably illustrate the use of the declaratory action in interpreting leases, and show the value of this form of procedure to the business world. One is the case of *Willing* v. *Chicago Auditorium Association*,

277 U. S. 274, decided by the Supreme Court of the United States in 1928; and the other is the case of *Washington-Detroit Theater Company* v. *Moore*, 229 N. W. 618, decided by the Michigan Supreme Court in 1930. The facts of the two cases are practically the same. In one the Chicago Auditorium Association held leases of 99 and 198 years on five tracts of land on which it had erected the Auditorium Building, containing an auditorium, concert hall and hotel. In the other, the Theater Company had a 99-year lease on a valuable lot on which a theater building was located. In both cases the buildings were inadequate and were operated at a loss to the lessees. In each case the lessee was able and willing to remove the old structure and build a modern one in its stead, thus enabling the lessee to make a profit from the lease, and at the same time greatly increasing the value of lessor's property. In each case there was no doubt as to right of the lessee to destroy the old building without the lessor's consent, counsel for the lessee in each case believing that the lease permitted such destruction without lessor's consent, while lessor's counsel took the opposite view. The lessors, seeing a possible opportunity to force an increase in the rent, or to secure a lump sum bonus as the price of consent, refused consent. In the Chicago Auditorium case this refusal had the effect of frightening away some bankers who had agreed to advance $15,000,000 for the erection of the new building, while in the Detroit case, the refusal had the effect of preventing a profitable sub-letting of the premises. In each case the lessee was afraid to begin demolishing the old building, for such action would almost certainly have resulted in a suit for injunction and for cancellation of the very valuable lease.

In the Detroit case, as Michigan had the Uniform Declaratory Judgment Law, the Theater Company went into a State court and asked for a declaration that the lease permitted the destruction of the old building and the erection of a new one. The declaration was promptly made and the work of demolishing the old building and of erecting the new one proceeded with only slight delay.

As there was no declaratory judgment law in Illinois, the Auditorium Association tried to find a remedy by going into a court of equity and asking to have a cloud removed from its title, the cloud consisting of the doubts as to the meaning of the lease contract and the fears engendered in the minds of the bankers who were to furnish the money, by the refusal of the lessors to consent to the removal of the old building. A non-resident lessor removed the case to a lower Federal court, which held that petitioner was not entitled to relief. This holding was affirmed by the Supreme Court of the United States, which declared that the doubts as to the meaning of the lease, as they arose from the terms of the lease itself, did not constitute a cloud on the title which a court of equity could remove. The court went further and indulged in dicta to the effect that what petitioner sought was a declaratory judgment, that the Federal courts had no power to make such declarations, and that such a power could not be conferred upon them by statute.

Here we see the great value of the declaratory judgment. A great civic enterprise, involving the expenditure of millions of dollars, is blocked for an indefinite time because the Illinois court and the federal court had not been authorized to meet the exigencies of the modern business world with a procedure suited to the times in which we live, whereas in Michigan which had adopted this procedure, the problem was soon solved and a great civic enterprise was soon in full operation.

By way of contrast with this failure of the old procedure in Illinois, look at the case of *State ex rel Enright* v. *Kansas City*, 204 Pac. 690, involving the powers granted to municipalities by the State of Kansas.

The statutes of the State of Kansas, prior to 1921, allowed cities to issue bonds for internal improvements to bear interest at 5 per cent. During the money stringency after the war, the Legislature in 1921 passed a law allowing cities to issues 6 per cent bonds for this purpose, if they contained a clause providing for pre-payment within five years. Kansas City, Kansas, believed it had the option of issuing bonds under either act, at 5 per cent without the pre-payment clause, or at 6 per cent with the pre-payment clause. It decided to use the 5 per cent bonds, without the pre-payment clause. The state, upon the relation of the county attorney, contending that the pre-payment clause had to be included in the 5 per cent bonds as well as in the 6 per cent bonds, brought a suit to obtain an adjudication respecting the city's power to issue bonds. To include the pre-payment clause in

the bonds would entail upon the city a loss of $25,000 in the market price of the bonds.

The judgment of the lower court upholding the city's contention was affirmed by the state supreme court. In concluding the opinion of the court, Mr. Justice Burch commends the declaratory judgment act in the following language:

"The proceedings in this case serve to illustrate the operation of the declaratory judgment act... The action was commenced in the District Court on February 7, 1922, and the defendant answered instanter. The cause was heard on the petition and answer, and a stipulation the pleadings stated the facts. The declaration of the District Court was rendered on February 7, and the appeal was lodged in this court on February 10. This court was in session when the appeal was filed. Because of the public importance of the question involved, the cause was advanced for immediate hearing, and on February 10 it was submitted for final decision, on oral argument and briefs of counsel which accompanied the appeal papers. The city may now (Feb. 24, 17 days after the suit was filed) proceed with its improvements without any of the embarrassments and without any of the delay which would have been encountered if the remedy of declaration of right had not been available."

New York Extends Judicial Notice to Matters of Law

LEONARD S. SAXE

STATUTORY IMPROVEMENTS in the law of evidence in this country are relatively few. Progress in the law of evidence has been achieved more by common law than by statutory change. Although there have been many suggestions for improvements in the field of evidence, nevertheless, as Mark Twain said about the weather, "Everybody talks about it, but nobody does anything about it."

The law of evidence in Anglo-Saxon jurisprudence consists chiefly of rules of exclusion. The courts have, in their efforts to be certain, leaned backward in excluding evidence the accuracy of which might be less than one hundred percent. Refusal to allow judicial notice to be taken of matters of law is a prominent example of the absurdity to which courts unnecessarily have extended this insistence on proof of what in many instances called for no proof.

What is judicial notice? It is a device by which the ordinary formal rules of evidence are suspended and common-sense informal methods of acquiring knowledge are utilized by the court. Courts and judges have always taken judicial notice of the general domestic law of their own states. With that exception, types of law which a court might judicially notice were extremely limited and the rules on this subject were enmeshed in technicalities. Prior to 1943, in New York, an unofficial volume containing the law of a sister state, material to a party's case, might have been objected to by one's adversary as "incompetent" or "hearsay" or improperly authenticated evidence. Pursuant to common law rules of evidence, the courts were obliged to sustain those technical objections and exclude the volume even though it was obvious that the book contained indisputable evidence of the law or regulation sought to be proved. If the court in such a case be permitted, as it is under the recently amended New York law, to take judicial notice of the law sought to be proved, it may simply examine the proffered book for evidence of the law of which it takes judicial notice. It may, of course, call for other evidence of the law judicially noticed and permit an objecting party to present evidence which disproves the completeness or correctness of the law judicially noticed.

Obviously, judicial notice is a very useful device. Professor Thayer commented in 1898, "Courts may judicially notice much which they cannot be required to notice. That is well worth emphasizing, for it points to a great possible usefulness in this doctrine, in helping to shorten and simplify trials; it is an instrument of great capacity in the hands of a competent judge; and is not nearly as much used, in the region of practice and evidence, as it should

Editor's Note: Mr. Saxe is executive secretary of the Judicial Council of the State of New York. For assistance in the preparation of this article he gives acknowledgment to Ralph M. Verni, Esq., of the New York bar.

be. * * * the failure to exercise it tends daily to smother trials with technicality, and monstrously lengthens them out."[1]

Research revealed that in New York the courts could not take judicial notice of the statutory or the common law of a sister state or of a foreign country or, with minor exceptions, even of the ordinances of cities, towns and villages of New York itself, or of the rules and regulations of federal or New York's own administrative boards and officers. Such laws, rules and regulations formerly had to be proved as though they were facts and were subject to the same rules of evidence as those which govern proof of ordinary facts.[2]

Perceiving the needless expenditure of time and money of the state, as well as of litigants, and the unjust and irrational results[3] reached under this state of the law, the Judicial Council of the State of New York, in what Dean William P. Richardson said was one of the most exhaustive research studies ever read by him, made recommendations to the New York Legislature,[4] which thereupon enacted a new section 344-a of the New York Civil Practice Act. This section provided that civil courts of record[5] and all courts of criminal jurisdiction could take judicial notice of all matters of law. The new statute, which became effective September 1, 1943, reads as follows:

"§ 344-a. Judicial notice of matters of law. A. Except as otherwise expressly required by law, any trial or appellate court, in its discretion, may take judicial notice of the following matters of law:

1. A law, statute, proclamation, edict, decree, ordinance, or the unwritten or common law of a sister state, a territory or other jurisdiction of the United States, or of a foreign country or political subdivision thereof.

2. A private act, or resolve of the legislature of this state, or of the congress of the United States.

3. An ordinance, resolution, by-law, rule or proceeding of the appropriate governing body of any city, county, town or village within this state.

4. A rule or regulation of an executive department, public board, agency or officer of this state, or of a city, county, town or village thereof.

5. A rule or regulation of an executive department of the government of the United States, or a public board, agency or officer created by the law thereof.

B. Whether a matter of law is judicially noticed pursuant to this section, or formal proof thereof is taken pursuant to other sections of this act, such law shall be determined by the court or referee and included in its findings, or charged to the jury as the case may be. Such finding or charge shall be subject to review on appeal and shall be known and otherwise treated as a finding or charge on a matter of law.

C. Where a matter of law specified in this section is judicially noticed, the court may consider any testimony, document, information or argument on the subject, whether the same is offered by counsel, a third party or discovered through its own research.

D. The failure of either party to plead any matter of law specified in this section shall not be held to preclude either the trial or appellate court from taking judicial notice thereof."

JUDICIAL NOTICE OF ALL TYPES OF LAW

This New York provision for judicial notice is believed unique in several respects. First and foremost, it is more complete and comprehensive than the provisions for judicial notice in any of New York's sister states.[6] As such it is the first wholly integrated reform of the doctrine of judicial notice. It is, in fact, believed to include all types or "matters" of law.

Although most of the states have provisions authorizing courts to take judicial notice of one or several of these matters of law set forth above, they have not authorized their courts to take judicial notice of others. This has placed the law of many states in respect to this mat-

1. Thayer, Preliminary Treatise on Evidence (1898) 309.

2. Under the New York statute, as it existed from 1933-1943, (N.Y.C.P.A., former § 391), only if formal evidence had already been admitted with respect to the law of another state was the court permitted, in effect, to take judicial notice by extending its knowledge of such law through its own research. (9th Annual Report of the Judicial Council of the State of N. Y., p. 279). Pursuant to the new section 344-a of the Civil Practice Act set forth in the text below, introduction in evidence of proof of the law of another state is no longer required as a condition precedent to a New York court's taking judicial notice of the law of a sister state through its own research.

3. For example, in the case of In re Cummings' Estate, 142 App. Div. 377, 391, 127 N. Y. Supp. 109, 119 (1st Dep't 1911), the appellate court, which had ascertained the law of California applicable to the case at bar, was compelled under the then existing New York law to remit the case for retrial and "proof" of the California law.

4. Ninth Annual Report of the Judicial Council of the State of New York, pp. 55 and 267-303.

5. It was extended to the Domestic Relations Court of the City of New York, a court not of record, by L. 1944, ch. 738.

6. Op. cit., note 4, p. 302.

ter in an anomalous form. For example, the courts in these states will take judicial notice of laws of sister states and in some cases even of foreign countries while refusing to take judicial notice of the laws and ordinances of some of their own municipalities.

LAW OF AMERICAN STATES

The Commissioners of Uniform State Laws perceived the need of having an American jurisdiction take judicial notice of the law of the other American jurisdictions. In 1936, a "Uniform Judicial Notice of Foreign Law Act" was recommended by them. The title of this Uniform Act is misleading as its scope is confined to judicial notice of the law of states, territories and jurisdictions of the United States. Section 1 of that Act reads:

"Every court of this state shall take judicial notice to "foreign" law by judicial decision.[9] state, territory and other jurisdiction of the United States."

Up to July 1944, seventeen states,[7] in addition to Hawaii, had enacted this Uniform Act. Twelve other states, including New York, have by independent statute legislated to the same effect,[8] while two states have extended judicial notice of "foreign" law by judicial decision.[9]

Thus, today the courts of some seventeen states are still unable to take judicial notice of the law of another American state or jurisdiction.

In these states, whenever the law of another state becomes material, it must be proved according to the strict rules of evidence governing the proof of facts, i. e., by official published statutes or reports or by oral expert testimony, or both. Concerning this procedure, the Commissioners of the Uniform State Laws in support of their proposed Uniform Act wrote:[10]

"[This] . . . was an inheritance from the insular common law of England of two centuries ago. For an English court, of course, all foreign laws were composed in a foreign language and were based on an alien system; naturally, therefore, they did not lend themselves to judicial notice. But the conditions are totally different in our member states; the law of a sister state is in our own language; its principles are substantially the same (except in Louisiana), and their tenor is readily ascertained by reference to the proper books, just as well as the law of the forum states."

The Judicial Council recited criticisms to the same effect from other sources.[11]

LAWS OF FOREIGN COUNTRIES

Only a few states permit judicial notice to be taken of the law of a foreign country.[12] The Uniform Judicial Notice of Foreign Law Act expressly excludes the law of foreign countries from its scope. In this respect the new section 344-a differs from the Uniform Act.

The Judicial Council of the State of New York recommended that all the courts of record of New York be permitted to take judicial notice of the law of foreign *countries* as well as the law of sister *states*, because, in some instances, for example, where the law of Canada or England is involved, the law of such foreign country may be ascertained and applied as easily as the law of a sister state. By taking judicial notice of the law of a foreign country, possible injustices in particular cases may be averted. Thus, where plaintiff's cause of action is found to depend wholly upon the law of a foreign country and counsel has inadvertently failed to prove such law at the trial, the appellate court is now permitted to take judicial notice of the law of the foreign country and dispose of the controversy on its merits.

If the applicable law is that of a foreign country whose language and institutions differ materially from ours, the court may, in its discretion, and doubtless will, ordinarily require counsel to prove it according to the rules of evidence, principally by oral, expert testimony.

However, such formal proof need not necessarily be required even where non-English law is concerned. If an appellate court is not permitted to take judicial notice of the law of a foreign country, it must either dismiss the cause of action or order a new trial. *Cuba Railroad Company* v. *Crosby*[13] outstandingly illustrates the injustice that is caused by the latter rule. In that case, the plaintiff, Crosby, lost his hand while working at defendant's machinery. Since the accident happened in Cuba, whether

7. Illinois, Indiana, Kentucky, Maine, Maryland, Minnesota, Montana, New Jersey, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Washington, Wyoming.

8. Arkansas, California, Connecticut, Georgia, Massachusetts, Michigan, Missouri, Mississippi, New York, North Carolina, Virginia, West Virginia.

9. New Hampshire and Vermont.

10. 9 Uniform Laws Ann. (1942) 269.

11. Op. cit., note 4, p. 282.

12. Op. cit., note 4, p. 284.

13. 222 U. S. 473 (1912).

or not plaintiff could recover depended on whether or not the law of Cuba permitted him to recover from his employer for the loss of his hand. Crosby's attorney sued in a United States District Court in which judgment was rendered for the plaintiff. The Supreme Court of the United States reversed the judgment because plaintiff's attorney had neglected to prove the law of Cuba. If such a situation should arise in New York, under the new statute the New York Court of Appeals may now merely ask counsel to brief the law of Cuba on the particular point in question or ascertain such law itself, rendering judgment for the plaintiff if it found that the law of Cuba was sufficiently clear. If the law of Cuba was not made sufficiently clear by this method, the Court of Appeals could reverse and order a new trial.

JUDICIAL NOTICE DISCRETIONARY

The New York statute now provides that the court "in its discretion, may take judicial notice . . ." The discretionary form of statute was recommended by the Judicial Council for several reasons. Since the law of foreign countries was included within the scope of the statute, it was believed undesirable to compel the courts to take judicial notice of the laws of foreign countries. In a particular case, the law, say, of Japan or Russia might be involved, and to force the court to ascertain the law of either of these two countries on its own initiative might well subject it to a task it would be incapable of performing or at least not care to undertake. Under the discretionary form the court may take, or refuse to take, judicial notice of the law of a foreign country, according to the individual problems presented by each case. Where counsel seeks to aid the court in ascertaining the law, the doctrine of judicial notice will serve to remove the barriers of the technical rules of evidence and permit the court to consult any source of the Russian or Japanese law without being hampered or delayed by objections to the incompetent or hearsay nature of the proof.

FAILURE TO PLEAD LAW NOT FATAL

A feature of the New York statute of great value is the provision that "the failure of either party to plead any matter of law specified in this section shall not be held to preclude either the trial or appellate court from taking judicial notice thereof." This clause is not intended to remove the general requirement that "foreign" law, if relied upon, ought to be pleaded, nor to allow *carte blanche* in pleading. It is intended, primarily, to permit justice by way of judicial notice to be done, despite such failure to plead the particular law invoked, if that failure is only harmless error and no litigant has been prejudiced thereby.[14]

The Uniform Judicial Notice of Foreign Law Act provides in section 4 that "To enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse party, either in the pleadings or otherwise." The late great Dean Wigmore felt that a provision for compulsory notice was desirable. While all must agree with the requirement of reasonable opportunity to present argument or proof in opposition, or both, it was felt that a provision such as that in the Uniform Act should not be expressly stated in the statute. If any surprise or prejudice to a litigant should be claimed, it is believed that judicial notice would not be taken by the courts in most instances, or if taken, would be held to be error upon analogy to similar situations, as where a pleading is sought to be amended at the trial and surprise is claimed. In a case where surprise is properly claimed in objecting to the court's taking judicial notice of a matter of foreign law that has not been pleaded, the court may either refuse to take judicial notice of the law involved, in which case the party relying on such law would then have to prove it according to the rules of evidence, or judicial notice may be withheld until the objecting party has had opportunity to brief or prepare evidence for presentation as to the law.

Moreover, although the Uniform Act does refer to "reasonable notice . . . either in the pleadings *or otherwise*" (italics supplied), this provision has been interpreted in such a fashion as to reach the same unfortunate result that would have been reached had there been no provision for judicial notice. In *Fardy* v. *Mayerstein*,[15] the Supreme Court of Indiana stated, "Appellant says the sale was a valid public sale under Massachusetts law of which we must take judicial notice. There was no such issue presented by the pleadings. The

14. Op. cit., note 4, p. 303.

15. . . . Ind. . . .; 47 N. E. (2nd) 315, 319 (1943).

Uniform Judicial Notice of Foreign Law Act . . . . dispenses with proof but not with pleading."

RECENT BENEFICIAL APPLICATION

One month after the new law had been in effect, a case came before the Court of Appeals—the highest court in New York State—in which the beneficial significance of the new statute was strikingly manifested. In *Graybar Electric Company, Inc.* v. *New Amsterdam Casualty Company*,[16] plaintiff brought an action on a contract-performance bond executed in Tennessee. Over the objection of the defendant that the bond was a statutory bond governed by a Tennessee statute and that the requirements of such statute had not been complied with, the lower court granted a motion by plaintiff for a summary judgment in the sum of $39,889.23. The Appellate Division affirmed the judgment and granted leave to the defendant to appeal to the Court of Appeals. Pending the appeal to the Court of Appeals, the highest court in Tennessee rendered a decision holding the identical type of bond which was the basis of plaintiff's cause of action to be a statutory bond, governed by the Tennessee statute. The New York Court of Appeals, in its opinion, per Loughran, J., stated, "We have been licensed to take judicial notice of foreign law (Civ. Prac. Act, § 344-a)," and the Court took judicial notice of the Tennessee decision and statute and held that the bond in the case at bar must be deemed a statutory bond and that the plaintiff had not compiled with the statutory requirements. It reversed the judgment of the two courts below and granted the motion of the defendant for dismissal of the complaint.

Prior to the enactment of section 344-a, three courses might have been open to the Court of Appeals under the facts presented in the *Graybar* case: (1) It might, and probably would, have affirmed the summary judgment for the plaintiff, refusing to consider the Tennessee decision, in which case an obvious injustice would have been done to the defendant; (2) it might have indulged in an artificial presumption as to the similarity of the New York and Tennessee *common law*, in which case a decision could not have been rendered on the merits of the cause of action; or (3) it might have reversed the summary judgment, remitted the case for trial in the light of the Tennessee decision wherein the defendant would be compelled to "prove" the Tennessee law, in which case the litigants and the state would have been put to unnecessary further expense. When the actual disposition of the case, namely, the disposal of the controversy on its merits, once and for all, is compared with the three alternatives open to the court under the previously existing law, set forth above, the advantages of the new law which permitted judicial notice to be taken of the law of the sister state are perceivable at once.

Under the new law, judicial notice has been taken in several other reported cases. Among the matters of law which have been judicially noticed are the regulations of the United States Office of Price Administration,[17] the regulations of the New York State War Council, as well as of ordinances and resolutions of New York State muncipialities.[18]

These recent cases indicate that the new law has effected a major improvement in the law of evidence and will prove to be an outstanding, progressive legislative achievement, saving the time of the courts which would otherwise be consumed by arguments of counsel over technical rules of evidence, as well as the money of litigants which would otherwise be expended in the employment of experts on foreign law, generally encouraging avoidance of the absurdities and injustices compelled under the former rules, and permitting Justice to lift her blindfold, in many cases.

16. 292 N. Y. 246 (1944).

17. People v. Lipoff, 181 Misc. 618, 45 N. Y. Supp. (2d) 636 (1943); Sommer v. E. B. Kelly Co., Inc., 47 N. Y. Supp. (2d) 57; (1944); Slack v. Glenwood Sightseeing Bus Co., Inc., 47 N. Y. Supp. (2d) 876.

18. In re City of New Rochelle, 46 N. Y. Supp. (2d) 645 (1943).

If I tried to read, much less answer, all the criticisms made of me and all the attacks leveled against me, this office would have to be closed for all other business. I do the best I know how, the very best I can. I mean to keep on doing this down to the very end.—*Abraham Lincoln.*

Michigan Bar Approves Judicial Selection, Retirement Proposals

The State Bar of Michigan, at its annual meeting last month, approved committee recommendations for an improved plan of nominating supreme court justices, a retirement pension plan for Michigan judges, a constitutional amendment to provide for majority verdicts by juries, and other proposals to improve the administration of justice in Michigan.

The present method of selecting supreme court justices, referred to by the committee as a ridiculous anomaly, consists of nomination by political party conventions, followed by election on a non-partisan ballot. The new plan calls for creation of a Judiciary Commission composed of three judges selected by the state judiciary, three lawyers chosen by the state bar commissioners, and three laymen appointed by the governor. This commission is to nominate at least two persons for each vacancy, the final choice between them to be made as at present by the voters on a non-partisan ballot. A constitutional amendment providing for nomination by a similar agency and appointment by the governor was defeated in the 1938 election.

The retirement plan would apply to all justices of the supreme court and judges of the circuit courts and municipal courts of record, and would provide for voluntary retirement on full pay upon reaching the age of 65 with 18 years of service, or the age of 70 with 12 years of service. Service after retirement is provided for upon request of the supreme court, and it is stipulated that retired judges shall not be eligible for retirement compensation if they engage in the practice of law.

The general principle of less than unanimous verdicts in civil cases was approved by the State Bar in 1943, and the 1944 convention approved the following form of constitutional amendment drafted by the Committee on Michigan Constitution:

"Sec. 27. The legislature may authorize a trial by jury of a less number than twelve *and in civil cases may authorize a verdict by less than a unanimous vote of the jury.*"

The same committee also drafted constitutional amendments, likewise approved, empowering the legislature to establish minimum qualifications for holders of judicial office, and requiring it to set up a procedure for removal of unfit judicial officers by judicial action.

California Selection Plan to Be Revamped

Ten years have passed since California first broke the ice with the adoption of a new plan for selection of judges. This plan provides for appointment by the governor subject to confirmation by a commission composed of the chief justice of the state, the senior presiding justice of the district, and the attorney general, and further subject to reelection by the voters on a non-competitive ballot.

The operation of the plan has been a disappointment both to its sponsors and to the public. There has been a feeling that it has not removed politics from judicial selection, either because of a general tendency of the commission to approve all appointments, or, as suggested by some members of the last state legislature, a feeling of obligation on the part of those members of the commission who owed their own appointments to the same governor. A bill in the 1943 legislature to abolish the present plan and restore direct election by popular vote was held up by a senate committee upon the promise of the State Bar to study and submit to the 1945 legislature suggested amendments to remedy the evils pointed out.

The report of that committee, as approved by the Board of Governors of the State Bar, appears in the July-August State Bar Journal. It recommends enlarging the Qualifications Commission to include two more members, the president of the State Bar and the president pro tem of the state senate, and it would then require four out of five votes for confirmation. Members of the commission appointed by the same governor would be ineligible to serve, and their places would be taken by justices of the same court oldest in service whose appointment was by a different governor.

The plan presently applies only to the justices of the supreme and appellate courts. Governor

Earl Warren at the start of his present term announced and has since followed the practice of submitting all interim appointments of superior and municipal judges to the state bar for approval, but that arrangement is personal and informal, and there is no assurance that his successor would followed it. The committee proposes the inclusion of these judges in the revised judicial selection plan.

Missouri Constitutional Convention Ends

The Missouri constitutional convention, which convened more than a year ago, adjourned on September 29. Its work, which has already been mentioned in this JOURNAL ("Constitutional Convention Studies Missouri Judiciary," 27:100, and "The Judicial Article of the Proposed Missouri Constitution," by Richard S. Righter, 28:52), will be submitted to the voters at a special election on February 27 for approval or rejection as a whole.

The convention appropriated $160,000 for publicity to sell the new constitution to the people between now and the day of the special election. The total cost of the new constitution has been estimated at about $1,250,000.

The new document is nearly a third shorter than the old one, containing 26,000 words instead of 37,000. If adopted, it will make many alterations in the state government, that of chief interest to our readers being the new court structure described in the article by Mr. Righter. The Missouri plan of judicial selection, already in force since 1940, was left unchanged.

From the C. L. L. A.

To promote the public interests by maintaining high standards of conduct in the legal profession and by aiding in the more efficient administration of justice, the bar integration movement is spreading by legislative enactment and by court rule. Voluntary associations have not attained the high objectives envisoned by those who seek bar integration. Bar organizations should be representative of the whole bar and fully empowered to enforce standards of conduct.

There is a recognized need for an improved system for the selection of judges. The Missouri plan for non-partisan selection is working successfully, and that general plan is spreading whereby judges run against their records on a ballot on which the voters indicate only approval or disapproval of retaining them in office. The original competent selection of judges, a stable and secure tenure of office beyond the reach of political influences, and adequate salaries and retirement pay are all matters now under consideration throughout the nation and necessary for the maintenance of a judiciary that will merit public respect.

Legislatures are giving judicial powers to commissions composed wholly or in part of laymen, and one such act recites that the commission "is not bound by technical or statutory rules of evidence or formal rules of procedure." The legislature that enacted this law evidently believed that justice could be better administered if the rules of evidence and procedure in lawyer-operated courts were abolished. With that evident conviction on the part of the public, as expressed in the enacted will of the representatives of popular government, the lawyers must either convince the public that recognized rules of evidence and procedure make for the more efficient administration of justice or lay tribunals operating without rules or precedents will take over our litigation.—*From the report of the Special Committee to Promote the Administration of Justice of the Commercial Law League of America.*

Legislative Program for Federal Judiciary

A successful legislative program for obtaining improvements in the administration of justice in the federal courts is indicated in the annual report, just published, of the director of the Administrative Office of the United States Courts. Within the past year Congress has passed a law to provide for official reporters in the federal courts, although for lack of the necessary appropriation the law has not yet been put into operation. Also passed were measures simplifying the schedules of charges of district court clerks, and transferring the power to regulate the fees of the clerks of the circuit courts of appeals from the Supreme Court to the Judicial Conference of Senior Circuit Judges.

Other bills now receiving favorable consideration in Congress provide for improvements in the system of United States commissioners, appointment of federal court bailiffs by the

judges they are to serve and putting them on a salary, and law clerks for district judges. The law clerk proposal is mentioned as an economy measure, in view of the additional time it will allow the judges for performance of their judicial functions by freeing them of burdensome detail work.

Georgia Bar Association Goes to Work

With assurance of support from Governor Ellis B. Arnall, the Georgia Bar Association is at work on an ambitious legislative program for presentation to the 1945 General Assembly, and its preliminary outline is now being discussed in weekly meetings of the circuit bar associations throughout the state.

Chief features of the 14-point program are self-government for the Georgia bar, rule-making power for the supreme court, retirement pensions for superior court judges, creation of a judicial council, a declaratory judgments law, and revision of trust and probate laws.

Pre-Legal College Requirements

Forty-two states and the District of Columbia now have a requirement of at least two years of college or its equivalent in addition to legal training for admission to the bar, according to the *1944 Review of Legal Education* recently published by the Section of Legal Education and Admission to the Bar of the American Bar Association. The six states not measuring up to that standard are Arkansas, Louisiana, Mississippi, Georgia, South Carolina and Maryland. The latter state in 1942 lowered its requirement from 60 semester hours, or two years of full-time college work, to 40 semester hours, or the equivalent of two years in evening liberal arts college.

Ohio Bar Organization to be Studied

A Committee on Ohio State Bar Organization has been created by the executive committee of the Ohio State Bar Association, to consider the relationship between the state and local bar associations and what each can do to serve the other and to work together.

Awaiting the committee's consideration are proposals to federate the state and local bar associations into a single organization, to create a house of delegates similar to that of the American Bar Association with representatives of the local associations governing the state association, to unite local bar officers and committees with the committees and program of the state association, to enlarge state bar committees to give more members opportunity to participate, to establish a combined state and local membership fee, to divide the state association into two sections representing the larger and smaller bars respectively for separate consideration of their different problems, and to elect the president a year in advance of his term and make him ex-officio a member of the executive committee during that year.

It is not contemplated that integration of the bar will be considered by the committee, the president has announced.

News Paragraphs

A new judicial council for Oregon is proposed in the report of the Judicial Administration Committee of the Oregon State Bar, to consist of the chief justice and one associate justice of the supreme court, three circuit judges, the chairman of the House and Senate judiciary committees, and two members of the state bar. If approved by the state organization, a bill will be introduced in the 1945 legislature.

The Iowa State Bar Foundation to receive and administer funds on behalf of the Iowa State Bar Association will be incorporated as a result of approval by the Board of Governors of the latter organization of an endowment plan submitted by a committee headed by Burt J. Thompson, Forest City.

Suggestions for amendments to the Federal Rules of Civil Procedure will be received up to December 15 by the Supreme Court Advisory Committee at its office in the Supreme Court Building, Washington, according to an announcement by Edgar B. Tolman, its secretary.

An Arkansas legal journal is one of the post-war plans of the Bar Association of Arkansas, which is maintaining a special committee from year to year to keep the project alive until such time as it is feasible to go ahead with it.

The Iowa Round Table radio program of the Iowa State Bar Association, temporarily off the air, will return in December with a new series

of interesting and informative discussions on topics of current importance.

"The State Bar meeting this year really amounted to something. A comparatively long list of proposed amendments to the state constitution was duly considered and given professional endorsement. It has offered leadership to the public in a field where such leadership is badly needed and has been rarely offered in the past."—*Detroit Legal Record.*

A bar referendum on candidates for the Supreme Court of Ohio is being conducted by the Ohio State Bar Association, and a separate referendum is being conducted by the Cleveland Bar Association, results of each to be announced this month. Biographical material regarding the candidates appeared in the September 4 number of the state bar publication, Ohio BAR.

Pensions for judges' widows would be provided for by a bill recently introduced in the Canadian parliament. The present law provides for a pension for the judges amounting to two thirds of their last salary. Under the bill a judge could elect to receive two-thirds of that amount during his lifetime and have one-third payable to his widow if she survives him.

Readers are invited to contribute news items regarding progress in judicial administration to this column.

Letters to the Editor

Uniformity in Canons of Ethics Needed

To the Editor:

Our State Bar committee on changes in the rules has been considering recently the Texas canons of ethics, and finds that while in principle most of the American Bar Association canons were adopted in Texas, the wording was changed or modified and some parts of the A. B. A. canons were eliminated. As a result, none of the Texas canons follow exactly the A. B. A. canons. We have no committee on professional ethics nor any agency to interpret our canons. Our Rules Committee, headed by G. C. Mann of Laredo, has filed a report recommending that Texas either adopt the A. B. A. canons entirely or that the State Bar of Texas set up a standing committee to interpret our own canons.

I have just read on page 7 of the June 15, 1944, issue of the *New Jersey Law Journal*, an article wherein the New York State Bar Association was presented a conflict of interpretations between their own canons and the A. B. A. canons concerning just how far a lawyer may go in sending out professional cards showing that he has resigned from a government agency and is specializing in some branch of the law.

My purpose in writing you is to suggest that an article in the JOURNAL of the American Judicature Society might develop the various conflicts between state canons and the A. B. A. canons with a view to considering the advisability of the adoption by all state bar associations of the A. B. A. canons outright. All lawyers should be governed by a uniform system of canons, it seems to me, and since the A. B. A. is the national body and has a standing committee on professional ethics, it would seem that the A. B. A. canons should be adopted by all states. While it might seem to some as an attempt to interfere with state bar organizations, I do not think this is a serious objection.

I know that Judge Orie L. Phillips, chairman of the A. B. A. committee, has received a number of complaints against lawyers who are not A. B. A. members, and his committee could not, therefore, take any action. I do not know whether the A. B. A. canons could be made to apply to all lawyers, regardless of membership in the A. B. A., but if it could be done it might be desirable.

WILLIAM J. PARK,
Secretary, State Bar of Texas
Austin, Texas.

State-Wide Standardized Instructions

To the Editor:

It may interest you to know that through the inspiration of the JOURNAL, the Association of District Judges of Nebraska is now work-

ing on what we hope will be a very worthwhile undertaking.

In No. 5 of Vol. 23, February, 1940, there was published a paper written by Judge William J. Palmer on the subject of standardized instructions to juries. It was called to the attention of our Association and excerpts were read from Judge Palmer's paper as it appeared in the JOURNAL. As a result, a committee composed of District Judges Jefferson H. Broady of Lincoln, Arthur C. Thomsen of Omaha, Ernest G. Kroger of Grand Island, J. Leonard Tewell of Sidney, and myself was appointed to commence work on a collection of standardized instructions for Nebraska.

So far as I know, ours is the only organization doing a state-wide work in this field. To date our Association has adopted over fifty standardized instructions, dealing largely with negligence cases. Many of our judges have already found the collection very helpful.

William F. Spikes

St. Paul, Neb.

Slow Decisions Better Than Wrong Ones

To the Editor:

I have been reading your most excellent JOURNAL for quite some time, as well as other law journals, and in all of these periodicals the emphasis seems to be entirely upon speeding up the products of the courts. Get rid of the cases; keep up with the docket; save the poor taxpayer's money. I will freely admit that the trial of a case in a court of law is a slow process and takes more time than a casual view of the matter would indicate to be necessary. The important thing to consider, however, is not how many cases go through the judicial hopper each term, but how many cases have been decided correctly.

There is danger that in our effort to speed up the mills of the gods we will forget that the primary reason for a mill is not rapidity of operation but the quality of the grist that comes out of it. At election time one of the principal talking-points of the judges is: When I was elected there were umpty-ump cases on the trial docket; now, at the close of my term, there remain only umpty cases." When I hear this I always wonder how many of those cases were correctly tried, or how many were forced to trial before some poor devil was able to get all his evidence together. Better continue a case a dozen times and try it fairly than rush it through and get the wrong result.

JOHN A. FORD

Dallas, Texas

Current Literature

BOOKS

New Horizons in Criminology, by Harry Elmer Barnes and Negley K. Teeters. New York: Prentice Hall, Inc., 1943, pp. xxvi and 1,069.

A large, well printed and well bound volume containing a thorough, up to date and authoritative discussion of every phase of the crime problem. Modern white-collar crime, some of it still bearing social approval, is shown in its true relation to other criminal activities. At every step in the handling of criminals obsolete and bad practices are condemned and better methods proposed. Facts presented regarding present-day third degree police practices are startling. Judicial criminal procedure is searchingly examined, and abolition of the prison system is urged. The book has a large bibliography and is well annotated—a one-volume library of modern criminology.

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Administrative Tribunals

The development of administrative law. Thomas J. Knight. 8 Ky. State Bar Journal 13-17 (Sep., 1944).

Administrative procedure and what to do about it. W. E. Stanley. 13 Kansas State Bar Journal 32-40 (Aug., 1944).

The Bar

Local bar assistance to lawyers returning from armed service. Thomas M. Powers. 17 Ohio BAR 133-6 (June 12, 1944).

The organized bar and the traffic problem. Waymon B. McLeskey. 17 Ohio BAR 193-202

(July 17, 1944).

Unification of the bar. Mayo A. Shattuck. 15 Boston Bar Bulletin 149-154 (July, 1944).

The West Virginia Bar—integrated or unintegrated. W. Va. Bar News, Aug., 1944, pp. 2-4.

Post-war problems of the legal profession—a symposium. 19 Indiana Law Journal 287-353 (July, 1944). A new world order—the American lawyer's role, Grenville Clark; Maintenance of professional status, Frank N. Richman; The lawyer and governmental administration, Cleon H. Foust; Problems of practice in large cities, Alan W. Boyd; Problems of practice in small cities, Willis Hickam; Civil service examining agencies, Ralph F. Fuchs; Legal examining agencies, Telford B. Orbison; Post-war legal education and the service men, Elliott E. Cheatham; Post-war problems of legal education, Bernard C. Gavit; The service man's viewpoint, C. Dallas Sands.

Court Organization

An international judicial system. Amos J. Peaslee. 67 N. J. L. J. 293, 295, 299 (Aug. 31, 1944).

What instrumentality for the administration of international justice will most effectively promote the establishment and maintenance of international law and order? Wayne D. Williams. 30 A. B. A. Journal 489-496 (Sept., 1944). 1944 Ross prize essay.

Criminal Procedure

One man grand jury in action. Wm. P. Lovett. 33 Nat'l Municipal Review 292-4 (June, 1944).

Some aspects of the trial of a criminal case in the federal court. Grover M. Moscowitz. 3 Fed. Rules Dec. 380-393.

Psychiatry in criminal trials. John Eric Nordskog. 17 So. Cal. L. Rev. 371-382 (June, 1944). Bibliography.

Federal rules of criminal procedure. George Z. Medalie. Lawyers Guild Review, Vol. 4, No. 3, pp. 1-8 (June-July, 1944).

The proposed federal rules of criminal procedure. Arthur T. Vanderbilt. Ohio Law Reporter, Sep. 25, 1944, pp. 18-22.

Legal Aid

Address. Louis Fabricant. 42 Legal Aid Review, No. 3, pp. 5-14 (July, 1944).

A Question for Lawyers, Harrison Tweed. 19 Los Angeles Bar Bulletin 132-4 (Dec., 1943).

Miscellaneous

Improving the administration of justice. Roscoe Pound. 37 Proc. Vermont Bar Ass'n. 41-61 (1943).

The new guesspotism. Frank W. Grinnell. 30 A. B. A. Journal 507-511, 525 (Sep., 1944). Stare decisis.

The meaning and duty of this hour. Robert N. Wilkin. 17 Ohio Bar Ass'n Report 77-84 (May 22, 1944).

The international law of the future. 22 Canadian Bar Review 277-376 (April, 1944). Full reprint of the work published separately by the American Bar Association Journal and reviewed by Judge Robert N. Wilkin 27 J. Am. Jud. Soc. 185 (April, 1944).

The international law of the future. Thomas Raeburn White. 15 Penn. Bar Ass'n Quarterly 289-96 (April, 1944). Review of the above.

25 Study Georgia Basic Law, Ellis Arnall; Constitution by Convention, Ted Loeb; New Task for a Legislature, John E. Bebout (constitutional revision in Georgia, Missouri and New Jersey) 33 National Municipal Review 11-21 (Jan., 1944).

New Members of The American Judicature Society

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